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COUNTERING CRIMINALIZATION: TOWARD A YOUTH DEVELOPMENT APPROACH TO SCHOOL SEARCHES

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That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of [c]onstitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.
West Virginia v. Barnette, 319 U.S. 624 (1943)

F**kn' with me 'cause I'm a teenager/ With a little bit of gold and a pager/ Searchin' my car, lookin' for the product/ Thinkin' every ni**a is sellin' narcotics.
N.W.A., *F**k tha Police*, *on* STRAIGHT OUTTA COMPTON (Priority 1988).

I. INTRODUCTION

In many of America's public high schools, a dangerous lesson is being taught. It is not in any textbook or lesson plan, nor is it the subject of a pop-quiz or standardized test, yet it is reinforced everyday in the hearts and minds of students as they are patted, frisked, and searched by school police, sniffed by drug-detecting dogs, or confined by fences topped with barbed wire.[1] It is a lesson in inferiority, in lowered expectations of privacy, and in second-class citizenship. It is a lesson that perpetuates the social norms that criminalize youth. It is a lesson that stays with them for life.

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1. *E.g.,* Layron Livingston, *New Dress Code, Barbed Wire Fence at John Tyler Raises New Concerns*, KLTV, (Aug. 9, 2010, 3:26 PM), http://www.kltv.com/global/Story.asp?s=12523930 (identifying plans to build a security fence at John Tyler High School); Christopher O'Donnell, *School's Prospects Seem Dim*, SARASOTA HERALD TRIB., Aug. 31, 2010, at B1, *available at* 2010 WLNR 17372495 (describing a school in Bradenton, Florida surrounded by a chain-link fence and barbed wire); Erika Mellon, *HISD Clears Fences of All Barbed Wire*, HOUS. CHRON., Feb. 26, 2010, at A1 (mentioning a superintendent's dissatisfaction with the way a barbed-wire fence appeared to the public); *"Correctional" Look All Wrong for School*, VA. PILOT & LEDGER-STAR, Nov. 29, 2008, at 6, *available at* 2008 WLNR 22880210 (commenting on how a school resembles a prison by virtue of its appearance); *Assembly Point—Breaking the News*, TIMES EDUC. SUPPLEMENT (London), Mar. 20, 2009, at 38, *available at* http://www.tes.co.uk/article.aspx?storycode=6010487 (discussing the role that terrorism plays in shaping the views of safety in schools). The *Times Education Supplement* advised school administrators to:

> Remind pupils that school is probably one of the safest places to be. . . . Go through each of the things they can see in their day-to-day school life and show photos of them in and around your school: walkie talkies so teachers can keep in touch with each other; fewer entrances to the school (most schools only have one way in - often with full-time receptionists); identity cards for pupils and teachers and special passes for visitors; swipe cards to get in and out of the building; CCTV cameras to check on playgrounds and corridors; and higher fences and walls, often with barbed wire on top.

Assembly Point—Breaking the News, supra.

In theory, a public education should provide all Americans with access to resources that cultivate literate, skilled, critical thinkers who are prepared to participate in higher education and the global marketplace. But perhaps public education's most important role is in the creation of republican citizens.[2] As Chief Justice Warren eloquently stated in *Brown v. Board of Education*,[3] "[public] education is the very foundation of good citizenship."[4] Since *Brown*, the Court has continually recognized the crucial role of education in American society, noting that "public schools [are] a most vital civic institution for the preservation of a democratic system of government,"[5] and that "education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . ."[6] While including civic education in the curriculum is important, part of this citizen education is achieved through extra-curricular political and legal socialization that occurs in school, because school is a place where students regularly interact with social control authorities, such as school officials, police officers, and are exposed to rules, social norms, and the moral values of mainstream society.[7] The Court itself acknowledges the socialization function of school, citing to research regarding education and political socialization.[8]

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2. Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671, 1697 (1990) ("The extent to which we take the commitment to democracy seriously is measured by the extent to which we take the commitment to education seriously."). Another writer notes that:

> The American decision for independence added a further dimension to the concept of the informed citizen. . . . [R]epublican governments, it was well known, rested on the virtue of their citizens: their public-spiritedness, their willingness to subordinate private interest to public good, their capacity to monitor their rulers for signs of tyrannical ambition, their knowledge of the essential rights government existed to protect. A republican government required a republican society. . . . Americans had to be made into republican citizens, citizenship required education.

Jack N. Rakove, *Once More into the Breach: Reflections on Jefferson, Madison, and the Religious Problem*, *in* MAKING GOOD CITIZENS: EDUCATION AND CIVIL SOCIETY 240 (Diane Ravitch & Joseph P. Viteritti eds., 2001).

3. 347 U.S. 483 (1954).

4. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

5. Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

6. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

7. Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 217 (2005).

8. Ambach v. Norwick, 441 U.S. 68, 77 (1979) ("These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists."); Plyler v. Doe, 457 U.S. 202, 221–22 (1963) (stating that education provides "the means to absorb the values and skills upon which our social order rests").

Unfortunately, in the years since *Brown* many of the gains in educational equality have been lost and the achievement gap between suburban and urban schools has widened.[9] The passionate rhetoric regarding citizen education epitomized by *Brown* has faded away as large metropolitan school districts face a myriad of serious challenges, including inadequate funding, low literacy, high dropout rates, teen pregnancy, and legitimate school safety concerns. Amid such headline-grabbing issues, public education's special function of preparing young people for democratic citizenship is sidelined. Citizen education gives way to "ghetto education" where, instead of being "'inculcate[d] [with] the habits and manners of civility as values . . . indispensable to the practice of self-government,'" students are treated as threats to public safety the minute they walk through the metal detector at the school house door.[10] Once inside, they are regulated through mechanisms of fear and control, often unable to avail themselves of even basic constitutional rights.[11] "Educating for citizenship, work, and the public good has been replaced with models of schooling in which students are viewed narrowly—on the one hand as threats or as perpetrators of violence . . . ."[12] Citizen education devolves into ghetto education when schools adopt "disciplinary practices that closely resemble the culture of the prisons."[13] Even the physical

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9. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 18 (2007), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf.

10. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681 (1986) (quoting CHARLES A. BEARD & MARY R. BEARD, THE BEARDS' NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)). I will address the phenomenon of "ghetto education" in a forthcoming article.

11. *See generally* NAACP LEGAL DEF. & EDUC. FUND, *Dismantling the School to Prison Pipeline* (2005), *available at* http://naacpldf.org/files/publications/Dismantling_the_School_to_Prison_Pipeline.pdf (discussing how under-funding, over-policing, extensive testing regimes, alternative schools placements, and overzealous discipline policies leave students with unmet educational needs and contribute to the school-to-prison pipeline). For example, in Wake County North Carolina, the Wake County Public School System interrogates students, without proper *Miranda* warnings, in the presence of police and without a parent, guardian or lawyer present. LARSON LANGBERG & CARY BREGE, ADVOCATES FOR CHILDREN'S SERVICES, ZERO TOLERANCE FOR THE SCHOOL-TO-PRISON PIPELINE IN WAKE COUNTY: MAGNITUDE OF THE CRISIS 2 (2009), *available at* http://www.legalaidnc.org/public/Learn/Statewide_Projects/ACS/ACS_Publications/IssueBrief_Dec-09_TheSchool-to-PrisonPipelineInWakeCo.pdf.

12. HENRY A. GIROUX, YOUTH IN A SUSPECT SOCIETY: DEMOCRACY OR DISPOSABILITY? 95 (2009).

13. *Id. The War on Kids*, a documentary by Cevin Soling, depicts how American public schools continue to become more dangerously authoritarian, controlling children by subjecting them to prison-like security, arbitrary punishment, and forced prescription of dangerous drugs such as Ritalin. THE WAR ON KIDS (Spectacle Films 2009).

structures of some schools resemble a prison.[14] The socialization that occurs in these schools criminalizes youth by normalizing restrictive means of social control. Children socialized in such an environment are ill prepared for active and engaged citizenship, but are well on their way to political marginalization, disenfranchisement, and incarceration.

The dominant narrative of youth criminalization, which applies in particular force to inner-city minority students, casts school children as dangerous, violent, drug-dealing, gang-affiliated, out-of-control troublemakers. Teachers and fellow students need protection from these menacing ambassadors of street thuggery.[15] The Supreme Court adopted this narrative in *New Jersey v. T.L.O.*,[16] where, under the rubric of school safety, students were stripped of the full protection afforded by the Fourth Amendment; probable cause, rather than reasonable suspicion, became the standard in school searches.[17] The sacrifice of students' rights in the name of public safety comes at a cost, especially because public schools provide such an important forum for democratic socialization. School is where children learn about the law and, at times, encounter the law first hand. Those encounters can either foster constitutional notions of autonomy and individual liberty, or undercut them. Moreover, society has an interest in the development of "fundamental values necessary to the maintenance of a democratic political system."[18] Models of school discipline that undervalue these concepts through reduced individual privacy for students and the increased use of law enforcement officers to enforce school rules "constructs a narrow range of meaning through which young people define themselves" because law, and the Constitution in particular, is more than just a set of rules.[19] It also serves as a tool of political and legal socialization, sending a normative message to those within its reach about their relationship with government, society, and the law itself.

What kind of message is conveyed when students are subjected to pats, frisks, sniffs, and searches on a regular basis? Children, particularly adolescents, who are subjected to these searches under the very low bar of

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14. ERICA MEINERS, RIGHT TO BE HOSTILE: SCHOOLS, PRISONS, AND THE MAKING OF PUBLIC ENEMIES 2–3 (2007) ("Schools look an awful lot like prisons, and sometimes schools look more like prisons than do real detention centers.").

15. Thuggery is defined as "a cutthroat or a ruffian; a hoodlum." *Thuggery*, THE FREE DICTIONARY, http://www.thefreedictionary.com/thuggery (last visited Nov. 5, 2011).

16. 469 U.S. 325 (1985).

17. New Jersey v. T.L.O., 469 U.S. 325, 340, 343 (1985).

18. Ambach v. Norwick, 441 U.S. 68, 77 (1979).

19. Henry A. Giroux, *Locked Out and Locked Up: Youth Missing in Action from Obama's Stimulus Plan*, ALTERNET (Feb. 21, 2009), http://www.alternet.org/rights/127460/locked_out_and_locked_up%3A_youth_missing_in_action_from_obama%27s_stimulus_plan/?page=entire.

reasonable suspicion, may feel that the law is unfair and question its legitimacy because they have been treated with distrust and disrespect by adults in positions of authority.[20] Even if they do not understand the vagaries of reasonable suspicion and how it differs from probable cause, young people can appreciate basic concepts of fairness, dignity and respect.[21] Repeated experiences with legal actors who seem to abuse their authority contributes to a sense of humiliation, rejection, and alienation that eventually leads students to seek acceptance and recognition in other, less "mainstream" venues.[22] The constant suspicion with which students are regarded under the current paradigm pushes them into a defensive posture that hinders their ability to become active and engaged citizens of their community and nation.[23] Disengaged from the "fundamental values necessary to the maintenance of a democratic political system," youth salvage their dignity by plugging into an oppositional culture born in despair and steeped in violence, decreasing the legitimacy of the rule of law, and, in some instances, feeding the school-to-prison pipeline.[24]

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20. *See* Fagan & Tyler, *supra* note 7, at 231 (showing the respect demonstrated by legal actors, such as the police, school disciplinary staff, and store security guards in shaping adolescents' perceptions about the legitimacy of the law and legal actors). *See also* Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Reducing School Suspensions and Expulsions*, 66 EXCEPTIONAL CHILDREN 381, 382–83 (2000) (arguing that when disciplinary rules are perceived as unfair, students feel rejected and powerless and are sent a message that they are incapable of following rules).

21. *See generally* RICHARD L. CURWIN ET AL., DISCIPLINE WITH DIGNITY (1988) (arguing that attacks on dignity are the most significant contributor to chronic behavior problems in school because when students' value and self-worth are consistently undermined, they protect their fragile sense of self-worth by rejecting mainstream values and notions of success). The deep sense of frustration, born out of their inability to gain acceptance of teachers, administrators and school officials colors their attitudes and beliefs about the legitimacy of school rules and the benefits of conforming to the rules. *Id.*

22. ELIJAH ANDERSON, CODE OF THE STREET: DECENCY, VIOLENCE AND THE MORAL LIFE OF THE INNER CITY 96 (1999).

> When students become convinced that they cannot receive their props from teachers and staff, they turn elsewhere, typically to the street, encouraging others to follow their lead . . . . [I]nvest[ing] themselves in the so-called oppositional culture . . . . Such a resolution allows these alienated students to campaign for respect on their own terms, in a world they control.
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> Impacted by profound social isolation, the children face the basic problem of alienation. Many students become smug in their lack of appreciation of what the business of the school is and how it is connected with the world outside.

Id. at 96–97.

23. *Id.*

24. Ambach v. Norwick, 441 U.S. 68, 77 (1979). The Safe School Study by the National Institute of Education, conducted in 1978, is one of the benchmark studies relating school violence to dimensions of school climate:

This anti-social conditioning is particularly detrimental to high school age youth because adolescents are undergoing significant psychological, intellectual, and emotional development. Brain science and developmental psychology tell us that adolescent youth are in the process of developing their identities and understanding their place in society.[25] During this time, youth are being "hardwired," shaped and programmed into patterns of thought and behavior that impact the way they interact with the world around them and determine what kind of adults they will become.[26] As a result, they have very fragile identities that make them particularly vulnerable to outside pressures and influences.[27] During the teenage years, children learn as much from their social interactions with peers and au-

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Using questionnaires, data were collected from students, teachers, and principals from 642 U.S. public schools. Community data from each school were prepared from the 1970 census. The institute's report clearly suggested that school administration and policies make a significant difference in victimization rates. Certain policies, the report stated, reduced disorder in schools: decreasing the size and impersonality of schools; making school discipline more systematic; decreasing arbitrariness and student frustration; improving school reward structures; increasing the relevance of schooling; and decreasing students' sense of powerlessness and alienation.

In a reanalysis of the Safe School Study data, Gottfredson and Gottfredson (1985) related student and teacher victimization to various factors internal and external to schools. Schools with the worst discipline problems were schools where the rules were unclear, unfair, or inconsistently enforced; schools that used ambiguous or indirect responses to student behavior (for example, lowered grades in response to misconduct); schools where teachers and administrators did not know the rules or disagreed on responses to student misconduct; schools that ignored misconduct; and schools where students did not believe in the legitimacy of the rules. Other major factors related to high levels of victimization included school size; inadequate resources for teaching; poor teacher-administration cooperation; inactive administrations; and punitive attitudes on the part of teachers.

Wayne N. Welsh, *The Effects of School Climate on School Disorder*, 567 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 88, 92–93 (2000).

25. *Webster's Dictionary* defines adolescence as "the period of life from puberty to maturity terminating legally at the age of majority." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 17 (11th ed. 2003). For the purposes of this Article, I use the term to refer to young people between the ages of twelve and at least nineteen years of age. Because the developmental studies suggest that brain development is not complete until the early twenties, there is an argument that, at least developmentally, adolescence continues past the legal age of majority.

26. Sarah Spinks, *Inside the Teenage Brain: Adolescent Brains Are Works in Progress, Here's Why,* FRONTLINE, PBS.ORG, http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html (indicating that the period of "hardwiring" occurs during adolescence).

27. Roper v. Simmons, 543 U.S. 551, 569 (2005) (discussing "outside pressures and influences" that play a role in affecting adolescents' development).

thority figures as they do from textbooks.[28] Therefore, the draconian disciplinary policies of America's urban public schools, where children are viewed with suspicion and treated like threats, create a self-fulfilling prophecy—when students are treated as threats to society, they become threats to society.[29]

This Article focuses on the search and seizure practices in America's public high schools and why such practices are developmentally inappropriate. In Part II, I will examine and critique the current paradigm of school search jurisprudence. I discuss how the Court's analysis largely ignores age as a factor in determining the reasonableness of a search. This Part also addresses the increased use of police officers to enforce school discipline. Drawing on neuroscience and developmental psychology, Part III discusses the developmental needs of youth, particularly in light of recent Supreme Court cases involving juveniles. The Court's endorsement of recent research in the area of adolescent brain development has important implications for school search jurisprudence because reasonableness is an evolving standard that can accommodate multiple interests. Part IV explores ways to strike a developmentally appropriate balance between safety and privacy in the context of the educational environment. In this Part, I discuss positive youth development and socialization, particularly as these concepts relate to notions of privacy, autonomy, and the legitimation of the law. I suggest a new paradigm for school search and seizure, which I call a "positive youth development approach" to school searches. Because of the special role public education plays in the creation of republican citizens, any school search framework should account for the realities of adolescent brain development and the particular tension between vulnerability and responsibility that occur in youth. Students and society have a convergent interest in a public education system that creates law-abiding citizens capable of making positive contributions to society. Therefore, when determining the reasonableness of a school search, this interest should be included in the balance.

In the Conclusion, I suggest doctrinal and policy changes to how schools conduct searches and seizures, which will help counter the trend

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28. Spinks, *supra* note 26 (recognizing that "the brain is capable of growth well beyond the first few years of life," and thus it should follow that adolescents are capable of learning from a wide variety of sources, including peer interactions and textbooks).

29. UDI OFER ET AL., N.Y. CIVIL LIBERTIES UNION, SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER-POLICING OF SCHOOLS 21 (2009); Paul J. Hirschfeld, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 79 (2008); Miriam Rokeach and John Denvir, *Front-Loading Due Process: A Dignity-Based Approach to School Discipline*, 67 OHIO ST. L.J. 277, 294 (2006); Christina L. Anderson, Comment, *Double Jeopardy: The Modern Dilemma for Juvenile Justice*, 152 U. PA. L. REV. 1181, 1202 (2004).

of increasing youth criminalization, by using the negative Fourth Amendment right as a tool for democratic socialization and positive youth development. I argue that probable cause is a more developmentally appropriate standard for searches that take place in schools, the training ground of citizenship. Probable cause is a clearly defined, workable standard that protects against arbitrariness and the perception of arbitrariness. Therefore, probable cause should be the unitary standard in school searches. I also suggest important implementation procedures that will bolster the socialization function of these new Fourth Amendment rights for students. Finally, in recognition that, at least for now, the applicable standard is reasonable suspicion, I examine how this standard can be implemented in a way that will advance positive youth development in school searches that are conducted by school officials.

II. THE POISONOUS PEDAGOGY OF *NEW JERSEY V. T.L.O.*

Back in the days, our parents used to take care of us.
Look at 'em now, they even f***in' scared of us.[30]

A. *Suspicious Minds*

The principal case in school search jurisprudence that created the current standard of reasonable suspicion is a 1985 case involving the search of a fourteen-year-old high school student's purse: *New Jersey v. T.L.O.*[31] A teacher found T.L.O. and another student smoking in a school bathroom in violation of the school disciplinary code.[32] The teacher sent T.L.O. to the assistant principal's office where T.L.O. denied smoking.[33] The assistant principal then searched her purse and discovered a pack of cigarettes and rolling papers.[34] Suspecting that T.L.O.'s purse might contain additional drug-related evidence, the assistant principal conducted a more thorough search of the purse.[35] This search uncovered "a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing."[36] The assistant principal turned over this evidence to the police and the state charged T.L.O. as a juvenile de-

30. NOTORIOUS B.I.G., *Things Done Changed*, *on* READY TO DIE (Bad Boy Records 1994).
31. New Jersey v. T.L.O., 469 U.S. 325 (1985).
32. *Id.* at 328.
33. *Id.*
34. *Id.*
35. *Id.*
36. *T.L.O.*, 469 U.S. at 328.

linquent.[37] T.L.O. filed a motion to suppress, which was denied by the juvenile court.[38] The court of appeals upheld the denial which the New Jersey Supreme Court reversed.[39]

In 1985, state and federal courts approached school searches in three different ways. In those days, the only public officials found in public schools were teachers and administrators, so the question was whether the Fourth Amendment applied to those officials at all. Some states regarded school officials as beyond the Fourth Amendment's reach because they were private citizens acting in loco parentis.[40] At the other end of the spectrum were states that required school officials to have probable cause before conducting in-school searches.[41] However, a majority of states took the middle ground, which was the approach taken by New Jersey and ultimately adopted by the Supreme Court; under this approach, the Fourth Amendment applies to searches conducted by school officials but "the special needs of the school environment require[d] assessment of the legality of such searches against a standard less exacting than that of probable cause."[42]

Therefore, on certiorari, the Court found that while the Fourth Amendment applies to school searches, probable cause is not required because it "is not an irreducible requirement of a valid search."[43] Rea-

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37. *Id.* at 328–29.

38. *Id.* at 329.

39. State *ex rel.* T.L.O. v. Engerud, 463 A.2d 934, 944 (N.J. 1983), *rev'd,* New Jersey v. T.L.O., 469 U.S. 325 (1985).

40. *E.g.*, *T.L.O.*, 469 U.S. at 332 n.2 (citing D.R.C. v. State, 646 P.2d 252, 261 (Alaska App. 1982)); *In re* Thomas G., 90 Cal .Rptr. 361, 365 (Cal. Ct. App. 1970); *In re* Donaldson, 75 Cal. Rptr. 220, 223 (Cal. Ct. App. 1969); R.M.C. v. State, 660 S.W.2d 552, 555 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); Mercer v. State, 450 S.W.2d 715, 718 (Tex. App.—Austin 1970, no writ)).

41. *T.L.O.*, 469 U.S. at 332 n.2 (citing State v. Mora, 307 So. 2d 317, 320 (La. 1975)). The Court also cites cases in which the probable cause standard was applied to school searches involving police or in which the school search was highly intrusive. *Id.* (citing M. v. Bd. of Educ. Ball-Chatham Cmty, Unit Sch. Dist. No. 5, 429 F. Supp. 288, 292 (S.D. Ill. 1977); Picha v. Wielgos, 410 F. Supp. 1214, 1219–21 (N.D. Ill. 1976); State v. Young, 216 S.E.2d 586, 594 (Ga. 1975); M.M. v. Anker, 607 F.2d 588, 589 (2d Cir. 1979)).

42. *T.L.O.*, 469 U.S. at 332 n.2 (1985) (citing Tarter v. Raybuck, 742 F.2d 977, 988 (6th Cir. 1984); Bilbrey v. Brown, 738 F.2d 1462, 1472 (9th Cir. 1984); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 488 (5th Cir. 1982); Bellnier v. Lund, 438 F. Supp. 47, 55 (N.D.N.Y. 1977); *M.*, 429 F. Supp. at 292; *In re* Christopher W., 105 Cal. Rptr. 775, 783 (Cal. Ct. App. 1973); State v. Baccino, 282 A.2d 869, 872 (Del. Super. Ct. 1971); State v. D.T.W., 425 So. 2d 1383, 1388 (Fla. Dist. Ct. App. 1983); *Young*, 216 S.E.2d at 594; *In re* J.A., 406 N.E.2d 958, 963 (Ill. App. Ct. 1980); People v. Ward, 233 N.W.2d 180, 184 (Mich. Ct. App. 1975); Doe v. State, 540 P.2d 827, 834–35 (N.M. Ct. App. 1975); People v. Scott D., 315 N.E.2d 466, 471 (N.Y. 1974); State v. McKinnon, 558 P.2d 781, 785 (Wash. 1977*); In re* L.L., 280 N.W.2d 343, 352 (Wis. Ct. App. 1979)).

43. *T.L.O.*, 469 U.S. at 340.

sonableness is all the Fourth Amendment requires.[44] To determine what was reasonable in the context of a public school, the Court balanced the students' interest in privacy against the "substantial interest of teachers and administrators in maintaining [school] discipline."[45] Although the Court agreed that students have a legitimate expectation of privacy at school, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[46] The Court explained:

> We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.[47]

And, just like that, probable cause was "jettisoned" in favor of reasonable suspicion.[48]

T.L.O. is a significant turning point in Fourth Amendment jurisprudence because it was the first time the Court departed from the probable cause standard for full-scale searches.[49] If this had been a full-scale search situation outside of school, prob able cause would have been the necessary standard. For example, if T.L.O. were an adult (or even a juvenile, for that matter) accused of violating a municipal smoking ban, probable cause would be required before the government could conduct a search of her purse.[50] Although over the decades the Courts' Fourth

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44. *Id.* at 341.

45. *Id.* at 339.

46. *Id.* at 340.

47. *Id.* at 341.

48. New Jersey v. T.L.O., 469 U.S. 325, 357–58 (1985) (Brennan, J., dissenting) ("The Court's decision jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth Amendment—on the basis of its Rohrschach-like [sic] 'balancing test.'").

49. *Id.* However, in the years after *T.L.O.*, the Court expanded the use of the reasonableness-balancing test to other types of searches. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (warrantless stops and examinations of all drivers passing through a "sobriety checkpoint"); Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (warrantless searches of the homes of probationers); O'Connor v. Ortega, 480 U.S. 709, 728 (1987) (warrantless searches of government employee's office, desk, or file cabinets).

50. As of July 2010, over 3,000 U.S. cities had passed some form of smoking restriction. AM. NON-SMOKER'S RIGHTS FOUND OVERVIEW LIST—HOW MANY SMOKE-FREE LAWS?, 1 (2011), *available at* http://www.no-smoke.org/pdf/mediaordlist.pdf. Some states

Amendment jurisprudence has followed a long and winding road, the general preference for searches pursuant to warrants justified by probable cause still exists.[51] And while some would argue that the exceptions to the warrant requirement have swallowed the rule, probable cause still remains the sine-qua-non of reasonableness, even when a warrant is not required.[52]

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have even created criminal penalties. *See*, *e.g.*, CALABASAS CAL. MUN. CODE §§ 8.12.030-.040 (2006) (making violation of the non-smoking ordinance a misdemeanor); LEXINGTON-FAYETTE CNTY. CODE OF ORDINANCES §§ 14.97-1049 (2003) (penalizing violators with fines and criminal prosecution in certain cases; MINN. STAT. § 144.417 (making violation of State Clean Indoor Air Act a petty misdemeanor).

51. Before the police could undertake a search of a person or their property or affect an arrest, they had to have a warrant justified by probable cause. Limited exception to the warrant requirement was made on the basis of exigent circumstances. *See* United States v. Jeffers, 342 U.S. 48, 51 (1951) (warrant not required in "exceptional circumstances"); United States v. Rabinowitz, 339 U.S. 56, 65–66 (1950) (holding that the Fourth Amendment permits a warrantless search incident to a lawful arrest). During this time, the Fourth Amendment right was grounded in property rights. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 464 (1928) (asserting that the Fourth Amendment protections extend to material things: "the person, the house, his papers or his effects"). In the late 1960s, the Court switched from a property analysis to a privacy analysis to resolve search and seizure cases. *See e.g.,* Katz v. United States, 389 U.S. 347, 353 (1967) (stating that the reach of the Fourth Amendment does not depend on a physical intrusion); Warden v. Hayden, 387 U.S. 294, 301 (1967) (discussing the right to privacy as an element of Fourth Amendment cases). Under a privacy analysis, the locus of the right bestowed by the Fourth Amendment is individual privacy, which is deserving of constitutional protection if (1) a person exhibits an actual subjective expectation of privacy and (2) this expectation is one that society recognizes as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Under this framework, the Court created a hierarchy of privacy expectations: expectations that society is willing to recognize receive full protection, diminished expectations of privacy receive minimal protection, and expectations of privacy that society is unwilling to recognize receive no protection. Rakas v. Illinois, 439 U.S. 128, 148–49 (1978) (holding that an automobile passenger cannot challenge the legality of a vehicle's search because they have no legitimate expectation of privacy in the passenger compartment of the vehicle). The sliding scale of privacy expectations paved the way for the abandonment of probable cause in some warrantless searches because in the case of diminished privacy rights, reasonableness was all that was required. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (creating a balancing test to determine the reasonableness of the search of a person, limited to a very brief detention with only a cursory pat-down of the outer clothing of an individual for the purpose of checking for weapons).

52. *See* Whren v. United States, 517 U.S. 806, 818–19 (1996) (holding that absent extraordinary factors in how the search and seizure is conducted, searches and seizures are presumed reasonable when police have probable cause). There is much debate regarding the "rule-swallowing" nature of exceptions to the warrant requirement. *See, e.g.*, Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 439–40 (1988) (arguing against a sliding-scale privacy inquiry); Julie Rikelman, *Justifying Forcible DNA Testing Schemes Under the Special Needs Exception to the Fourth Amendment: A Dangerous Precedent*, 59 BAYLOR L. REV. 41, 67 (2007) (warning against the continued expansion of the special needs exception); Tracey

Probable cause is presumed to be reasonable because it is the procedural safeguard upon which warrants rest, and a search pursuant to a warrant based on probable cause is the only kind of search explicitly authorized by the Fourth Amendment.[53] Probable cause is found to exist where " 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[54]

Under this standard, using the previous example, if the individual suspected of violating the smoking ban (let's call her Tracy) is confronted by police and denies the allegation, the inquiry ends. As in the school setting, it is generally the smoking, not the mere possession of cigarettes that constitutes the offense.[55] If the police want to go further and search Tracy's purse for evidence of a violation, they must have specific, trustworthy information that such evidence will be found there. For example, probable cause would exist if a reliable witness saw Tracy put the extinguished cigarette into her purse or this action was clearly captured on a video surveillance camera. Otherwise, there is no probable cause to search her purse. A mere suspicion, however reasonable, will not justify such a "severe violation of subjective expectations of privacy."[56] Unlike reasonable suspicion, probable cause requires more than a "common-

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Maclin, *Justice Thurgood Marshall: Taking*, 77 CORNELL L. REV. 723, 797 (1992) (stating that the consent exception has swallowed the rule requiring warrants before the search of a home can be undertaken); Susan Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 274 n.65 (indicating that "the exceptions for exigent circumstances and seizures incident to arrest swallow the rule").

53. Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 20–21 (1994).

54. Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (citing Carroll v. United States, 267 U.S. 132, 162 (1925)). The Fourth Amendment to the Constitution of the United States guarantees:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

55. State *ex rel.* T.L.O. v. Engerud, 463 A.2d. 934, 943 (N.J. 1983), *rev'd*, New Jersey v. T.L.O., 469 U.S. 325 (1985) ("Mere possession of cigarettes did not violate school rule or policy, since the school allowed smoking in designated areas. The contents of the handbag had no direct bearing on the infraction."). The United States Supreme Court reasoned that possession of cigarettes would be relevant evidence of a violation of the school rule in question. *T.L.O* 469 U.S. at 345. Therefore, since the assistant principal had a reasonable suspicion that the purse would contain cigarettes, the search was justified. *Id.*

56. *T.L.O.*, 469 U.S. at 337–38.

sense" suspicion.[57] If, as in *T.L.O.*, there is nothing beyond common sense to connect the purse to the violation, Tracy's "right to be left alone" remains mostly intact, whereas T.L.O.'s has been severely violated.[58] Under probable cause, the adult citizen is given the benefit of privacy, whereas under reasonable suspicion, the student, a citizen-in-the-making, is not.[59]

In fleshing out how the reasonable suspicion standard should be applied in the context of school searches, the Court drew on *Terry v. Ohio's*[60] two-part reasonableness inquiry.[61] Under *Terry*, a search is reasonable if it is "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place."[62] Under this standard, the Court concluded that the search of T.L.O.'s

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57. *Id.* In *T.L.O.*, the Court characterizes the assistant principal's suspicion as "the sort of 'common-sense [conclusion] about human behavior' upon which 'practical people'—including government officials—are entitled to rely." *Id.* at 346 (citing United States v. Cortez, 449 U.S. 411, 418 (1981)).

58. *T.L.O.*, 469 U.S. at 346. The makers of our Constitution:

> [C]onferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

59. I do recognize that the Supreme Court also articulated a reasonable suspicion standard for searches conducted by public employers on their employees in *O'Conner v. Ortega*, 480 U.S. 709 (1987). However, for reasons mentioned in the introduction and further discussed in Parts III and IV, high school age children are particularly susceptible to their environment and the public school setting plays a critical role in socializing young people into the laws and norms of our democratic republic. The unique vulnerabilities of youth in conjunction with the special legal socialization function of mandatory public education distinguishes public school from public employment. Public employees are, generally, adult citizens who have (presumably) already been socialized into civil society.

60. 392 U.S. 1 (1967).

61. *T.L.O.*, 469 U.S. at 342. The majority cites *Terry* as precedent for the notion that a search can be legal even if based reasonable suspicion. However, the Court's reliance on *Terry* for this point is arguably misguided because as Justice Brennan explains in his dissent, "[t]he line of cases begun by *Terry* . . . provides no support" for a standard less than probable cause when a full scale search is at issue. "for they applied a balancing test only in the context of minimally intrusive searches that served crucial law enforcement interests. The search in *Terry* itself, for instance, was a 'limited search of the outer clothing.'" *Id.* at 360 (Brennan, J., concurring in part and dissenting in part) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). The search of T.L.O was a full-scale search as are most school searches today.

62. Terry v. Ohio, 392 U.S. 1, 20–21 (1967). It is interesting to note that *Terry* was intended to apply only to limited weapons searches for the safety of the officer. *Id.* at 26. It expressly did not apply to searches for evidence, although, in many cases, school searches are just that. *Id.* at 31.

purse was reasonable.[63] Because the search of T.L.O. was based on an individualized suspicion, the Court did not address whether individualized suspicion was required under the newly minted reasonableness standard for searches by school officials but hinted that it may not be.[64] Individualized suspicion is a requirement of probable cause.[65]

The Court justified its departure from probable cause, in part, by acknowledging the growing crisis of violence, weapons, drugs, and crime in schools.[66] Words like "safety," "security," "order," and "misbehavior" are repeated throughout the opinion.[67] Juvenile crime was at its peak in the 1980s, and the Court was clearly responding to the national fervor over this issue.[68] Writing for the majority, Justice White acknowledges that "school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."[69] Justice Powell's concurrence states: "[T]he school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in

63. *T.L.O.*, 469 U.S. at 341–24.

64. *Id.* at 342 n.8. "In other contexts, however, we have held that although 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.'" *Id.* (citing United States v. Martinez-Fuerte, 428 U.S. 543, 560–61 (1976) quoting Camara v. Mun. Court, 387 U.S. 523 (1967)).

65. *See*, *e.g.*, Ybarra v. Illinois, 444 U.S. 85, 91 (U.S. 1979) ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.").

66. *T.L.O.*, 469 U.S. at 350 n.1.

67. *See generally id.*

68. JEFFREY BUTTS & JEREMY TRAVIS, URBAN INST.: JUSTICE POL'Y CTR., THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, 2 (2002), *available at* http://www.urban.org/UploadedPDF/410437.pdf. "[J]uvenile arrests for Violent Index offenses (i.e., murder, forcible rape, robbery, and aggravated assault) grew 64 percent between 1980 and 1994. Juvenile arrests for murder jumped 99 percent during that time." *Id. See also* Pierre Thomas, Virginia Weekly, *Crime Hits a High in Summer*, WASH. POST, June 29, 1989, at V1 (writing that the police attribute increased crime during the summer largely due to idle juveniles); Peter Applebome, *Juvenile Crime: The Offenders Are Younger and the Offenses More Serious*, N.Y. TIMES, Feb. 3, 1987, at A16 ("Juvenile justice officials say that younger children are becoming involved more often in serious criminal activity usually associated with older youths or adults."); Tom Shales, TV Preview, *The Youngest Killers*, WASH. POST, Sept. 3, 1981, at C1 (providing that, because of a lack of expectation from society, kids "are willing to kill, and even be killed"); Bill Bryan, *Teen Violence Soars: Courts 'In A Crisis'*, ST. LOUIS POST-DISPATCH, July 9, 1989, at 1D (quoting a police sergeant as saying "There's just more violence today with young people"); Davan Maharaj, *Juvenile Crime Rises in Shirley, Residents Decry Delinquency, Teens Say They're 'Hanging Out'*, NEWSDAY (N.Y.–Brookhaven ed.), June 29, 1988, at 35 (mentioning the difference between what teenagers see as "hanging out," and what others view as "loitering, which sometimes results in incidents of violence and vandalism").

69. *T.L.O.,* 469 U.S. at 339.

recent years has prompted national concern."[70] The United States, in its amicus curiae brief supporting a lower standard of suspicion in school searches (which was cited by the Court), used empirical studies on school violence to conclude that "many schools are in such a state of disorder that not only is the educational atmosphere polluted, but the very safety of students and teachers is imperiled."[71] Even Justice Brennan in his dissent agrees that "we can take judicial notice of the serious problems of drugs and violence that plague our schools."[72] With these concerns weighing heavily on one side of the balance, student privacy concerns were in serious peril.[73]

To some extent, *T.L.O.* was part of a broader trend in the narrowing of Fourth Amendment rights in response to the "war on drugs," a strategy that has been largely unsuccessful, and much decried but fueled by a powerful narrative that awakens deeply held, if often irrational, fears.[74] Like the narrative of the "war on drugs," the narrative of the dangerous, po-

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70. *Id.* at 350 (1985) (Powell, J., concurring).

71. Brief for the United States as Amicus Curiae Supporting Reversal at 40–41, *T.L.O.*, 469 U.S. 325 (No. 83-712), 1984 WL 565546. The brief states:

> In 1978, the National Institute of Education (NIE), an agency of the Department of Education, reported that *each month* in America's secondary schools 282,000 students were physically attacked; 112,000 students were robbed by means of force, weapons, or threats; and 2,400,000 students had their personal property stolen. NIE also reported that almost 8% of urban junior and senior high school students missed at least one day of school a month because they were afraid to go to school.
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> With respect to secondary school disorder affecting teachers, NIE reported that each month 6,000 teachers were robbed; 1,000 teachers were assaulted seriously enough to require medical attention; 125,000 teachers were threatened with physical harm; and 125,000 teachers encountered at least one situation in which they were afraid to confront misbehaving students.

Id. at 39–40.

72. *T.L.O.*, 469 U.S. at 357 (Brennan, J., concurring in part and dissenting in part).

73. *See* Martin R. Gardner, *Student Privacy in the Wake of* T.L.O.*: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 920 (1988) ("[W]hat [the Court] giveth in applying the [F]ourth [A]mendment to the schools, it perhaps taketh away by invoking the balancing approach."); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1669 (1986) (mentioning how searches under the Fourth Amendment, when applied in a school context, "are considerably relaxed when . . . conducted by school officials").

74. *See generally, e.g.,* Diane-Michele Krasnow, *To Stop the Scourge: The Supreme Court's Approach to the War on Drugs*, 19 AM. J. CRIM. L. 219 (1992); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camera *and* Terry, 72 MINN. L. REV. 383 (1988); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987). "In the history of human reaction to irrational fear, drug interdiction policies are a classic example of Brandeis' teaching: 'Men feared witches and burnt women.'" David Helfeld, *Narcotics, Puerto Rico, Public*

tentially violent youngster roaming the halls of our public schools, ready to shoot and kill "has features of what sociologists describe as a moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat."[75] In the immediate wake of *T.L.O.*, scholars and commentators saw the writing on the wall with regard to the Fourth Amendment rights of students and tried to suggest ways to limit its reach, but the holding inevitably created a slippery slope that in the following years, the Court slid down and fell off.[76] The unanswered questions of *T.L.O.*, including the role of law enforcement, its applicability to blanket searches without individualized suspicion (such as dog sniffs and metal detectors), and the extent to which students have a legitimate expectation of privacy in desks, lockers, and now cell phones, are not easily resolved. Meanwhile, the narrative of youth criminality as a serious threat to society remains a potent theme in American culture and a driving force of public policy.[77]

Policy: In Search of Truth and Wisdom, 75 REV. JUR. U.P.R. 1029, 1049 (2006) (citing Whitney v. California, 274 U.S. 357, 376 (1927)) (Brandeis, J., concurring)).

75. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 807 (2003). The authors argue that:

> The elements of a moral panic include an intense community concern (often triggered by a publicized incident) that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community. Although the fervor typically fades in a relatively short time, panics can effectively become institutionalized if legal and policy changes result.

Id.

76. *See* Irene Merker Rosenberg, New Jersey v. T.L.O.*: Of Children and Smokescreens*, 19 FAM. L.Q. 311, 329 (1985) ("[T]he decision may well have a spillover effect . . . . It is therefore questionable whether the Court will be able to resist the inexorable pull of the *T.L.O.* case."). Other scholars have written:

> Although *T.L.O.* sidesteps the constitutionality of blanket school searches by reserving any opinion on whether individualized suspicion is an essential element of the reasonableness requirement, the Court in other contexts has repeatedly stressed that the *Terry* reasonable suspicion standard requires *particularized* suspicion. There is no reason why individualized suspicion should not also be extended to the school setting.

Myrna G. Baskin & Laura M. Thomas, Note, *School Metal Detector Searches and the Fourth Amendment: An Empirical Study*, 19 U. MICH. J.L. REFORM 1037, 1054 (1986). The concern over issues left unanswered by *T.L.O.* (such as whether individualized suspicion is required) became manifest as the Court used *T.L.O.* to justify suspicionless searches of all students who participate in extracurricular activities and of student athletes. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, (2002); Vernonia School District 47J v. Acton, 515 U.S. 646, 665 (1995).

77. Political figures still utilize the narrative of violent youth to support and justify social control of young people. *See* Bob Von Sternberg, *A Push to Try Preteens as Adults*, STAR TRIB. (Minneapolis), Feb. 11, 2011, at 1B (reporting on efforts by members of Minnesota's House of Representatives to pass "Emily's Law," which would allow children as young as ten years old to be tried as adults). Culturally, whether violent "gangsta" rap

However, what was kept at bay in 1985 continues to bubble below the surface, as tensions between students and school officials continue to brew. Things came to a head in *Safford Unified School District* v. *Redding,*[78] a case in which thirteen-year-old honor student Savana Redding was strip-searched on the basis of a tip by another student that she might have ibuprofen on her person in violation of school policy.[79] The Court reasoned that the assistant principal did not have sufficient suspicion to warrant a strip search, because the allegations against Savana did not indicate that the drugs presented an immediate danger or that they were concealed in her underwear.[80] While *Redding* is a victory for student privacy because it sets a floor for violations under the reasonable suspicion standard, it sets that floor at complete humiliation, which is not representative of most searches.[81] Moreover, the *Redding* Court did find that the assistant principal had sufficient suspicion to justify searching Savana's

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lyrics actually contribute to violent behavior has yet to be demonstrated with any conclusiveness. *See*, *e.g.*, Jeanita W. Richardson & Kim A. Scott, *Rap Music and Its Violent Progeny: America's Culture of Violence in Context*, 71 J. OF NEGRO EDUC., 175, 183 (2002) (providing evidence of a statistical link between violent lyrics and "the violent contexts many of the lyricists chronicle"). However, the thuggish image of masculinity promoted by rap music is one of the dominant portrayals of Black youth in popular culture. Violent lyrics that glorify killing, drugs, and criminal behavior contribute to a perception that the youth (Black or otherwise) who listen to this music are inherently dangerous. At a Senate Commerce Committee hearing in June of 1998, a teacher of thirteen-year-old Mitchell Johnson, who was accused of gunning down classmates at school, told lawmakers that Johnson was influenced by the violence portrayed in the rap music he played repeatedly before the shooting. Eun-Kyung Kim, *Debate Over Rap Lyrics Continues*, CBS NEWS, June 17, 1998, *available at* http://www.cbsnews.com/2102-207_162-11983.html. The senator who called the hearing expressed concern that the music industry marketed the most violent music to teens. *Id.* The hearings also targeted violent lyrics from shock rocker Marilyn Manson, who appeals to White teens. *Id.* As an example of the type of lyrics in question, in Bone Thugs 'N Harmony's "Gangsta Attitude," rapper Bizzy proclaims: "You see no pistol's in the holster—Watch the dot's on your forehead—I'm gunnin' while you're runnin—[a]nd there's plenty of bloodshed—[t]here's no sympathy over killin—I already warned you—[y]ou crossed the path of a maniac—[s]o now you're a goner." BONE THUGS 'N HARMONY, *Gangsta Attitude*, *on* FACES OF DEATH (Bone Enterprise 1994). In "Disposable Teens," Manson warns: "The more that you fear us the bigger we get the more that you fear us the bigger we get and don't be surprised, don't be surprised don't be surprised when we destroy all of it." MARILYN MANSON, *Disposable Teens*, *on* HOLY WOOD (Interscope Records 2000).

78. 557 U.S. __, 129 S. Ct. 2633 (2009).

79. Redding v. Safford Unified Sch. Dist. No. 1, 557 U.S. __, 129 S. Ct. 2633, 2637 (2009).

80. *Id.*

81. As Judge Wardlaw said in writing for the majority of the Ninth Circuit Court of Appeals, "[the strip search of a thirteen-year-old girl] is a violation of any known principle of human dignity." Redding v. Safford Unified Sch. Dist. No. 1, 531 F.3d 1071, 1088 (9th Cir. 2008).

backpack and outer-clothing.[82] There is language in *Redding* that addresses adolescent vulnerabilities and the corresponding importance of personal privacy.[83] However, as a practical matter, *Redding* does not alter the basic framework of *T.L.O.*, and thus its applicability to the average school search is limited: it does not prevent school officials from conducting invasive searches of backpacks, purses, and outer-clothing on little more than a glorified hunch.[84]

Although it does not alter the *T.L.O.* framework, *Redding* is illustrative of the length to which schools will go to enforce school rules and exemplifies the problem with the amorphous reasonable suspicion standard as it currently applies to school searches. While it should "not require a constitutional scholar to conclude that a nude search of a [thirteen]-year-old child is an invasion of constitutional rights" in the case of Savana Redding, it took nine such scholars from the nation's highest Court to settle the matter.[85] The problem is that reasonable suspicion provides so much latitude for searching that school officials can construe

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82. *Redding*, 557 U.S. at __, 129 S. Ct. at 2641 (2009).

83. *Id.* Most notably, Justice Souter states that "[t]he reasonableness of [Savana's] expectation" of bodily privacy "is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure." *Id.* (citing Brief of Amici Curiae the Nat'l Assoc. of Soc. Workers et al. at 6–7, *Redding*, (No. 08-479), 2009 WL 870022). The brief that Justice Souter cites to for this notes that "strip searches . . . can result in serious emotional damage." Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices that May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998).

84. *Redding*, 557 U.S. at __, 129 S. Ct. at 2645 (Stevens & Ginsburg, JJ., concurring in part and dissenting in part); *id.* at 2647 (Thomas, J., concurring in part and dissenting in part). The factors that contributed to the assistant principal's initial suspicion of Savana Redding were (1) an uncorroborated statement from a student who was found to have ibuprofen pills in her pocket who claimed the pills came from Savana; (2) Savana's association with an "unusually rowdy group at the school's opening dance"; and (3) an uncorroborated claim from another student that alcohol had been served a party at Savana's house the night of the dance. *Id.* at 2640–41. Under a probable cause standard, unsubstantiated self-serving claims and what is essentially an allegation of normal teenage behavior at a school dance would not justify a search. *Id.* at 2639.

85. Doe v. Renfro, 531 F.2d.91, 92–93 (7th Cir, 1980); *accord Redding*, 557 U.S. at __, 129 S. Ct. at 2644 (Stevens & Ginsburg, JJ., concurring in part and dissenting in part) (citing Steven, J., concurring in part and dissenting in part in New Jersey v. T.L.O., 469 U.S. 325, 342 n.25 (1985)). Justice Souter's majority decision in *Redding* attempts to remove some of the ambiguity from the reasonable suspicion standard by stating that reasonable suspicion requires "a moderate chance of finding evidence of wrongdoing." *Redding*, 557 U.S. at __, 129 S. Ct. at 2639 (2009). Justice Souter also attempts to flesh out how reasonable suspicion should operate in school searches, describing a sliding scale that requires a search to be justified by corresponding factual support. *Id.* at 2642. For a more thorough discussion on this aspect of *Redding*, see Lewis R. Katz & Carl. J. Mazzone, Safford Unified Sch. Dist. No. 1 v. Redding*, and the Future of School Strip Searches*, 60 CASE W. RES. L. REV. 363 (2010).

almost anything as reasonable.[86] This problem is evidenced by the fact that even though the Court found the strip search of Savana Redding unreasonable under the Fourth Amendment, they extended sovereign immunity to the School Board because the prima facie unreasonableness of the search was not clearly established by *T.L.O.* or any other precedent.[87] The Court found that there were "numerous" and "well-reasoned" cases that expressed a "disuniform view of the law" regarding strip searches.[88] The diversity of opinion regarding strip searches is symptomatic of the general state of the reasonable suspicion case law—in any given category, behavior on either end of a spectrum can invite suspicion.[89] "Behavior, hearsay, seemingly innocent comments, and observations can all form legitimate bases for action."[90]

If anyone and anything can be viewed as suspicious, the exercise of discretion becomes particularly susceptible to all kinds of bias, including racial bias because determining what constitutes a reasonable suspicion is based on a subjective interpretation of behavior.[91] Potentially innocent

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86. *See* Martin H. Belsky, *Random vs. Suspicion-Based Drug Testing in the Public Schools—A Surprising Civil Liberties Dilemma*, 27 OKLA. CITY U. L. REV. 1, 19–21 (2002) (listing twelve potential justifications for a school official to perform such searches under the reasonable suspicion standard).

87. *Redding*, 557 U.S. at __, 129 S. Ct. at 2644.

88. *Id.* "[T]he cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted." *Id.*

89. *See* Belsky, *supra* note 86 (discussing the arbitrary nature of strip search reasonableness determinations). Obviously, there can be other examples where any articulated basis of suspicion will be accepted as reasonable.

90. *Id.*

91. *See* L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2058–59 (2011) (indicating that the United States Supreme Court has offered changes to improve poor policing and more effectively protect privacy against arbitrary and often racially biased government intrusion). As Professor Richardson explains in her critique of the reasonable suspicion standard in stop-and-frisk encounters between citizens and police:

> *Terry* . . . allows officers to stop and frisk an individual based on their interpretation of an individual's ambiguous behavior . . . The behavioral assumption underlying the reasonable suspicion test is that a well-intentioned officer is capable of interpreting identical behavior similarly, regardless of the race of the individual they are observing. While this behavioral assumption is intuitively appealing, it does not withstand scientific scrutiny. Officers may [un]consciously use a more lenient standard when judging the behavior of [W]hites versus [B]lacks . . . . [Un]conscious stereotype activation in the presence of [B]lack individuals can cause officers to interpret ambiguous behaviors performed by [B]lacks as suspicious, aggressive, and dangerous while similar behavior engaged in by [W]hites would go unnoticed.

Id. at 2061–62. Professor Richardson applies a behavioral realist framework to stop-and-frisk Fourth Amendment doctrine. *Id.* at 2040. She utilizes research in the field of implicit

behavior can become a reasonable suspicion to search when "deep-seated, perhaps unconscious, affections, fears, and aversions" affect decision-making.[92] The cultural narrative of the dangerous young Black thug distorts the perception of all urban adolescents.[93] Therefore, like officers on the street, school officials—no matter how well-meaning—are influenced in their decision making process by race-based stereotypes about students.[94] While explicit bias is relatively easy to prove and clearly ille-

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social cognition, which demonstrates how unconscious biases affect behavior, to argue that the *Terry* standard, which was adopted by *T.L.O.*, results in arbitrary, and thus, unreasonable intrusions on privacy. *Id.* at 2059–60. One of the doctrinal reforms she suggests is discarding the reasonable suspicion standard in favor of probable cause. *Id.* at 2075–77.

92. RANDALL KENNEDY, RACE, CRIME AND THE LAW 144–45 (1997).

93. The news media is a dominant purveyor of the narratives of youth, race and crime. *See* Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 563–65 (2000) (discussing a study demonstrating how news media's crime reporting can condition attitudes toward race and crime). Other scholars note:

> There is abundant evidence suggesting that "mainstream America," particularly [W]hite mainstream America, associates (and has long associated) African[-]American and Latino male adolescents and young adults with violence, danger, and disorder. There can be little doubt that this association, powerfully reinforced by continuous coverage of the high profile assaults on children and exemplary ([W]hite) adults—attacks the media attributed explicitly and exclusively to young Latinos and African[-]American males—figured significantly in the creation of a more ominous category of transgressing adolescent.

Paul Colomy & Laura Ross Greiner, *Making Youth Violence Visible: The News Media And the Summer of Violence*, 77 DENV. U. L. REV. 671, 681 (2000). Even when not racially coded, youth violence is often sensationalized in the media. *Compare* Peter Slevin & William Claiborne, *1st Grader Shoots Classmate to Death; Pair Had Quarreled the Previous Day*, WASH. POST, Mar. 1, 2000, at A1 (featuring a story about a shooting by a six-year-old who killed a victim on the front page), *with* Peter Slevin & Jaclyn Serson, *Pa. Hostage-Taker Surrenders After Fatal Shootings; 2 Dead, 3 Critically Wounded in Rampage*, WASH. POST, Mar. 2, 2000, at A2 (placing coverage of a hostage attack which took the lives of more persons deeper in the paper).

94. Rowan L. Pigotta and Emory L. Cowen, *Teacher Race, Child Race, Racial Congruence, and Teacher Ratings of Children's School Adjustment*, 38 J. SCH. PSYCH. 177, 189 (2000) (studying teacher ratings of students' behavior, competencies, and future educational prognosis based on race). The study found that "African[-]American children were judged by [Black and White] teacher groups to have more serious school adjustment problems, fewer competencies, more negatively stereotypic personality qualities, and poorer educational prognoses than White children." *Id.*; *see also* Sophie Trawalter et al., *Attending To Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1326 (2008). The paper goes on to explain that:

> The stereotype of young Black men as criminal is deeply embedded in the collective American consciousness (and unconscious). . . . The present findings offer the sobering suggestion that the association between young Black men and danger has become so robust and ingrained in the minds of social perceivers that it affects early components of attention.

gal, implicit bias is almost impossible to prove and can impact discretionary decisions to much the same effect.[95] As a result, students of color are more likely to be singled out for searches than their White counterparts.[96] The effects of this kind of disparate treatment on adolescents will be discussed later, but the potential for biased decision making inherent in reasonable suspicion is, in and of itself, a cause for concern.

Yet, the flexibility and discretion that reasonable suspicion provides is exactly why it appeals to school administrators.[97] Without some flexibility and discretion, how can school officials be expected to keep their campuses safe? In a post-Columbine world, officials need to make snap decisions without having to navigate hyper-technical rules.[98] Moreover, the potential for abuse of the reasonable suspicion standard is mitigated by the fact that teachers and administrators care for their students and want them to succeed. "[T]here is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education."[99] Educators, unlike officers enforcing the criminal law, often "enter the profession . . . for the chance to make a positive difference in

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Id.

95. Whren v. United States, 517 U.S. 806, 813 (1996). Although the Court in *Whren* refused to consider the subjective motive of the law enforcement officers in making stops, they acknowledged that "the Constitution prohibits the selective enforcement of the law based on considerations such as race." *See also* State v. Soto, 734 A.2d 350, 353 (N.J. Supp. Ct. 1996) (using statistical evidence to support finding that State Police were stopping minority motorists solely on the basis of race).

96. *See* Tamar Lewin, *Raid at High School Leads to Racial Divide, Not Drugs*, N.Y. TIMES, Dec. 9, 2003, at A20. (describing a drug raid at a racially-mixed school that apparently targeted Black students).

97. *See* Petition for Writ of Certiorari at 17, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. __, 129 S. Ct. 2633 (2009) (No. 08-479), 2008 WL 4573923 (arguing that anything more than reasonable suspicion "places student safety and school order at risk by impairing the ability of school officials to effectively carry out their custodial responsibility"); Brief of Amicus Curiae Nat'l Sch. Bd. Assoc. & Am. Assoc. of Sch. Administrators in Support of Petitioners at 3, *Redding*, 557 U.S. __, 129 S. Ct. 2633 (No. 08-479), 2008 WL 4906096 ("Deference to educators' judgments recognizes that the role of the courts in school administration should necessarily be limited in order to avoid placing unwise constraints on the ability of school officials to preserve the learning environment and protect the safety of students."); Brief for the United States as Amicus Curiae Supporting Reversal, *supra* note 71, at 45 (supporting reasonable suspicion because "there is no need for the judiciary to impose rigid constraints on school officials in their day-to-day work").

98. *See* Brief for Petitioners on Writ of Certiorari, *supra* note 97, at 24 (asserting that under a reasonable suspicion standard school officials "retain the flexibility to respond swiftly to protect students and maintain order"). For an explanation of Texas's reaction to juvenile offenders post-Columbine see Elizabeth A. Angelone, Comment, *Texas Two-Step: The Criminalization of Truancy under the Texas Failure to Attend Statute*, 13 SCHOLAR 433, 446 (2011).

99. New Jersey v. T. L. O., 469 U.S. 325, 349–350 (U.S. 1985) (Powell, J., concurring).

students' lives, despite often limited pay, resources, and appreciation."[100] Requiring them to adhere to the rules of criminal procedure in their interactions with students detracts from the informality of the student-teacher relationship and potentially hinders their ability to react effectively to dangerous situations.[101]

These important and valid concerns are addressed in greater detail in Part IV below. For now, suffice it to say that undoubtedly, maintaining safety and orderliness is an important responsibility for schools today, just as it was when *T.L.O.* was decided. However, the reality in public schools has changed significantly during the twenty-five years since that decision. The nexus between law enforcement and school officials has become an important part of school disciplinary policy in a way that was perhaps unforeseen in 1985. The introduction of law enforcement into the school disciplinary process affects all aspects of the school's social climate, including the "special relationship" between students and teachers.

B. *The Elephant in the Room*

The Court in *T.L.O.* was careful not to discuss the standard required in searches conducted by or in conjunction with police because the facts of the case did not present this issue.[102] Neither do any of *T.L.O.*'s progeny, including *Redding*.[103] Because of the Court's continuing silence on this issue, there is an elephant in the room that has grown over the years.[104]

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100. Reply Brief for Petitioner at 11, *Redding*, 557 U.S. __, 129 S. Ct. 2633 (No. 08-479), 2009 WL 1007123.

101. Brief for the United States as Amicus Curiae Supporting Reversal, *supra* note 71, at 14–15.

102. *T.L.O.* 469 U.S. at 342 n.7.

103. *Redding*, 557 U.S. at __, 129 S. Ct. at 2640; Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 831, 833, 844 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995). If *T.L.O.* created a proverbial slippery slope with regard to warrantless searches in public schools, *Vernonia* and *Earls* slide down that slope and nearly fall off a cliff. *Vernonia* allows for suspicion-less drug testing of student athletes and *Earls* allows the same for all students involved in extracurricular activities. It seemed that the next step was for the Court to approve of suspicion-less searches conducted by drug-sniffing dogs. There is currently a circuit split with regard to whether such searches violate student's Fourth Amendment rights, and the Court has thus far refused to settle the issue. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1269 (9th Cir. 1999); Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 488 (5th Cir. 1982); Doe v. Renfrow, 631 F.2d 91, 94 (7th Cir. 1980).

104. Searches and seizures involving police at school is a rich area of litigation. Courts are divided with regard to how school police should treat students vis-á-vis the Fourth Amendment. Some have found that probable cause is required. *In re* A.J.M., 617 So. 2d 1137, 1138 (Fla. Dist. Ct. App. 1993) ("[W]here a law enforcement officer directs, participates or acquiesces in a search conducted by school officials, the officer must have

Now it is too big to ignore.[105] Policing, or in certain instances, over-policing, has, in the view of some, replaced school safety as the major concern in public education.[106]

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probable cause for that search, even though the school officials acting alone are treated . . . to a lesser constitutional standard."); F.P. v. State, 528 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1988) (holding "that the 'school official exception' is not applicable under the factual circumstances of this case"); State v. Tywayne H., 933 P.2d 251, 253, 254 (N.M. Ct. App. 1997) (officers involved were not SROs, but had been hired by the school as security at a school dance). Most other courts have found that school police are authorized to search students under the same standard as school officials. *See* Shade v. City of Farmington, 309 F.3d 1054, 1060 (8th Cir. 2002) (affording immunity to an officer that aided in a search); People v. Dilworth, 661 N.E.2d 310, 318 (Ill. 1996) (applying reasonable suspicion to school searches conducted by SROs); State v. Angelia D.B., 564 N.W.2d 682, 690 (Wis. 1997) (holding that the level of suspicion does not change when a school police officer conducts a search); T.S. v. State, 863 N.E.2d 362, 379 (Ind. Ct. App. 2007) (finding that SROs are school officials under *T.L.O.*); State v. N.G.B., 806 So. 2d 567, 568–69 (Fla. Dist. Ct. App. 2002) (permitting an officer to conduct a search because a school official authorized the officer's assistance); J.A.R. v. State, 689 So. 2d 1242, 1244 (Fla. Dist. Ct. App. 1997) ("If a school official has a reasonable suspicion that a student is carrying a dangerous weapon on his or her person, that official may request *any* police officer to perform the pat-down search for weapons without fear" of Fourth Amendment violations or probable cause requirements); *In re* Josue T., 989 P.2d 431, 439 (N.M. Ct. App. 1999) (allowing an officer to search a student on school grounds, so long as the search is reasonable). In a third approach, the Tennessee Supreme Court found that the applicable standard depends on the role and function of the SRO within the school. R.D.S. v. State, 245 S.W.3d 356, 369 (Tenn. 2008).

105. For example:

> [T]he National Association of School Resource Officers (NASRO), serves as an example of the growth in the number of school police officials. Although NASRO is a relatively young organization, having been formed in 1991, in a decade and a half NASRO built a roster of more than 15,000 members.
>
> As to estimates of the number of school police officers in the United States, analyses of Law Enforcement Management and Administrative Statistics (LEMAS) data show that more than a third of all sheriffs' offices and almost half of all local police departments have assigned sworn officers to serve in schools, with a total of more than 17,000 officers serving in schools, and that public school districts employ more than 3,200 sworn officers.

Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, 34 J. OF CRIM. JUSTICE 591–604 (2006).

106. N.Y. CIVIL LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 4 (2007), *available at* http://www.aclu.org/pdfs/racialjustice/overpolicingschools_20070318.pdf (documenting the rise of police in New York City's public schools and its negative impact on students); Norberto Valdez et al., *Police in Schools: The Struggle for Student and Parent Rights*, 78 DENV. U. L. REV. 1063, 1064 (2001) (providing a case study of the police practices in Northern Colorado schools and specific examples of "high schoolchildren being questioned by the [law enforcement] officers without another adult present and without notification of parents"); Marian Wright Edelman, *The Growing Problem of Over-Policing Our Schools*, CHILDREN'S DEF.

The influx of law enforcement into public school can be attributed in part to the national fervor over school violence that motivated the *T.L.O.* Court to strip students of full Fourth Amendment protection in the first place, and in part to a well-meaning but over-zealous response to highly-publicized acts of violence committed at schools around the country in the past decade.[107] Police officers who are placed into public schools are referred to as School Resource Officers or SROs, and although they have been utilized in public schools since 1953[108] the use of police in schools has been steadily on the rise for approximately the last fifteen years.[109] On their Facebook page the National Association of School Resource Officers describe school policing as the "fastest growing" area of law enforcement.[110] In 2005, nearly seventy percent of public school students, ages twelve through eighteen, reported that police officers or security guards patrol their hallways.[111] The U.S. Department of Education reports that police are a daily presence in over half of the public high schools in the nation.[112]

The Omnibus Crime Control and Safe Streets Act of 1968 was amended in 1998 to encourage the use of school resources officers. The text of the Bill defines a school resource officer (SRO) as:

> [A] career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing po-

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FUND (Mar. 2, 2009), http://www.childrensdefense.org/newsroom/child-watch-colums/child-watch-documents/growing-problem-over-policing-our-schools.html.

107. The late 1990's saw a rash of high-profile school shootings: Pearl, Mississippi; West Paducah, Kentucky; Jonesboro, Arkansas; Edinboro, Pennsylvania; Springfield, Oregon; Richmond, Virginia; and most memorably, Littleton, Colorado. JENNY REESE, SCHOOL SHOOTINGS OF THE 1990s: COLUMBINE AND OTHER SCHOOLS AFFECTED BY GUN VIOLENCE 3–13 (2010); Kenneth S. Trump, *School Violence and Crisis 98: Lessons Learned,* NATIONAL SCHOOL SAFTEY AND SECURITIES SERVICES, http://www.schoolsecurity.org/news/summer98.html (last visited Nov. 5, 2011). There were twenty-five deaths from school shootings in the 1996–97 school year and forty deaths in the 1997–98 school year. REESE, *supra,* at 339. The massacre at Columbine High School in Littleton left fifteen dead in one day in 1999. *Id.* at 3.

108. Connie Mulqueen, *School Resource Officers More Than Security Guards*, 71 AM. SCH. & UNIV., July 1999, at SS17. The first SRO was in Flint, Michigan, in 1953. *Id*.

109. Johanna Wals & Lisa Thurau, *First, Do No Harm, How Educators and Police Can Work Together More Effectively to Preserve School Safety and Protect Vulnerable Students*, CHARLES HAMILTON HOUSTON INST. FOR RACE & JUST., March 2010, at 1, *available at* http://charleshamiltonhouston.org/assets/documents/news/FINAL%20Do%20No%20Harm.pdf.

110. National Assoc. of School Resource Officers (NASRO), FACEBOOK, http://www.facebook.com/home.php?filter=LF#!/NASRO.org?sk=info (last visited Nov. 5, 2011).

111. RACHEL DINKS ET AL., NAT'L CENTER FOR EDUC. STAT., U.S. DEP'T OF EDUC., INDICATORS OF SCHOOL CRIME & STATISTICS: 2007, at 60 (2008).

112. *Id.* at 61.

> lice department or agency to work in collaboration with schools and community-based organizations . . . to address crime and disorder problems, gangs, and drug activities affecting or occurring in or around an elementary or secondary school.[113]

Ideally, SROs are available to help provide leadership examples for all students on campus.[114] Police intervention into public education is often viewed as a way to improve the relationship between students and the police.[115] Under the "triad" model adopted by many school resource officer programs, SROs are expected to do more than just enforce the law: they also teach and mentor students.[116]

In these roles, police not only maintain discipline but secure students' social boundaries.[117] "An analysis of police programs in schools reveals that police officers function simultaneously as security officers, risk educators, informant-system operators, and counsellors, and that they mobilize students and staff to play these roles as well."[118] School resource officers are in the school every day and are part of the school community. They know who the "good kids" and "bad kids" are and they try to protect the entire school from those "bad kids." "[The] main purpose [of having police officers in school] is to develop rapport with the students so that students trust them enough to either inform them about other classmates planning violent incidences or turn to SROs for help when they themselves are in trouble."[119] This image of the friendly, trustworthy po-

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113. Pub. L. No. 105-302, 112 Stat. 2841 (1998) (codified at 42 U.S.C. § 3796 dd-8). The statute further continues that SRO's should work:

> [T]o develop or expand crime prevention efforts for students; to educate likely school-age victims in crime prevention and safety; to develop or expand community justice initiatives for students; to train students in conflict resolution, restorative justice, and crime awareness; to assist in the identification of physical changes in the environment that may reduce crime in or around the school; and to assist in developing school policy that addresses crime and to recommend procedural changes.

Id. at 2841–42.

114. *See* KAREN HESS & HENRY WROBLESKI, POLICE OPERATIONS 528 (2d ed. 1997) ("The police department's school resource officers (SROs) are the front-line intervention specialists who unite efforts among the school district, the community, and the police department to maintain order.").

115. *Id.*

116. PETER FINN ET AL., NAT'L INST. OF JUST., COMPARISON OF PROGRAM ACTIVITIES AND LESSONS LEARNED AMONG 19 SCHOOL RESOURCE OFFICER PROGRAMS 1 (2005).

117. *Id.* However, because the level of crime and disorder in a particular school will dictate how much time an SRO can dedicate to the various roles, SROs in inner city schools will spend most of their time doing law enforcement and very little time teaching or mentoring. *Id.*

118. RICHARD ERICSON & KEVIN HAGGERTY, POLICING THE RISK SOCIETY 8 (1997).

119. Mulqueen, *supra* note 108.

lice officer that can identify and prevent disciplinary infractions before they happen is appealing but perhaps a bit too idyllic to ring true in the most turbulent schools. Here, where the brute forces of marginalization wreak havoc in all aspects of the community, police are viewed with extreme distrust.[120] Children in these schools already have adversarial relationships with law enforcement, which is only exacerbated by their presence in the school.

Thus, the influence of police in the schools can have an impact that extends beyond the good intentions of advocates of SRO programs because the presence of these officers shapes the school social climate and students' legal socialization.[121] In *T.L.O.*, Justice Powell justified the lowered standard in school searches by recognizing the following:

> The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of relationship exist between school authorities and pupils.[122]

By incorporating police into schools, the line between school official and law enforcement officer is blurred and the special relationship between students and teachers deteriorates into one that is increasingly adversarial.[123] Using police as the school disciplinarians allow schools to rely on "these officers to help them enforce control, even for non-violent and otherwise routine student mischief."[124] This is evidenced by the increas-

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120. ANDERSON, *supra* note 22, at 34. "The police . . . are most often viewed as representing the dominant [W]hite society and as not caring to protect inner-city residents." *Id.*

121. *See* Aaron Kupchik & Nicole L. Bracy, *To Protect, Serve and Mentor? Police Officers in Public Schools*, *in* SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 21, 22 (Torin Monahan & Rodolfo Torres eds., 2009) (highlighting the "potential advantages and disadvantages of placing police in public schools"); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 839 (2007) (discussing the importance of school as an important site for the socialization of children).

122. New Jersey v. T.L.O., 469 U.S. 325, 349–50 (1985) (Powell, J., concurring).

123. *See* Gerald Grant, *The Character of Education and the Education of Character*, DAEDALUS, Summer 1981, at 141 (noting the "adversarial and legalistic character of urban public schools").

124. Sean McCollum, *Policing Our Schools*, TEACHING TOLERANCE (Mar. 7, 2010), http://www.tolerance.org/blog/policing-our-schools. *See also* S.C. DEP'T OF JUVENILE JUSTICE, ANNUAL STATISTICAL REPORT 2007-2008 13 (2009) (recognizing that in South Carolina, the single most common offense resulting in juvenile court referral during the 2007–2008 school year was "Disturbing School.").

ing number of school-based arrests for minor incidents in recent years.[125] Increasing the number of school-based arrests changes the nature of school discipline because crime then becomes the prism through which students are viewed and the criminalization of youth "becomes the most valued strategy in mediating the relationship between educators and students."[126]

Because of the close nexus between school administrators and law enforcement, the "hallways of our nation's public schools" have become portals to "the revolving door of the criminal justice system."[127] School police take advantage of the lowered standard of suspicion by conducting searches of students and their belongings in conjunction with school officials.[128] Other jurisdictions allow school resource officers to search stu-

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125. *See, e.g.*, ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005) (noting growth in the number of school-based arrests in select jurisdictions); CHILDREN'S DEF. FUND, AMERICA'S CRADLE TO PRISON PIPELINE 125 (2007) (finding a tripling in the number of school-based arrests in Miami-Dade County from 1999–2001); Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 80 (2008) (asserting that "problems that once invoked the idea and apparatus of school discipline have increasingly become criminalized"); Daveen Rae Kurutz, *School Arrests, Citations Jump by 46 Percent*, PITTSBURGH TRIB. REV., Aug. 23, 2008 (documenting a forty-six percent increase in the number of school-based arrests and citations in Allegheny County in a single year).

126. Henry Giroux, *Brutalizing Kids: Painful Lessons in the Pedagogy of School Violence* , FOURWINDS10.COM, (Oct. 8, 2009), http://www.truthwinds.com/siterun_data/health/abuse/news.php?q=1255196823.

127. Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067, 1108 (2003).

128. *E.g.*, *Police Search Avondale Students*, WDIV LOCAL 4 (last updated Mar. 15, 2010), http://www.clickondetroit.com/education/22838815/detail.html (describing a search at a high school where the Michigan State Police and Auburn Hills Police Department assisted school personnel in checking students' backpacks and other belongings). *See also* Cason v. Cook, 810 F.2d 188, 192 (8th Cir. 1987) (applying the reasonable suspicion standard where a school official and a school resource officer searched a student in response to a report of theft); Vassallo v. Lando, 591 F. Supp. 2d 172, 193–94 (E.D.N.Y. 2008) (concluding that the reasonable suspicion standard applied to a search of a student conducted by high school authorities aided by law enforcement agents); *In re* L.A., 21 P.3d 952, 960–61 (Kan. 2001) that because "[t]he statutory function of a school security officer is to protect school district property and the students, teachers, and other employees on the premises of the school district," officers can search students under the reasonable suspicion standard and are not required to issue *Miranda* warnings); *In re* Angelia D.B., 564 N.W.2d 682, 689–90 (Wis. 1997) (holding that reasonable suspicion applies to searches by school resources officers when they conduct them "in conjunction with school officials and in furtherance of the school's objective to maintain a safe and proper educational environment"); *In re* K.S., 108 Cal. Rptr. 3d 32, 37 (Cal. Ct. App. 4th 2010), *modified,* 2010 Cal, App, LEXIS 557 (Cal. Ct. App. 1st 2010) (holding that reasonable suspicion was the appropriate standard when a school official, accompanied by the police, searched a student's

dents under the reasonable suspicion standard even when they are acting on their own authority.[129] The Supreme Court of Kansas determined that school resource officers do not qualify as officials because they are "not employed by an entity whose primary responsibility is law enforcement."[130] However, regardless of who employs them and whether they are officially labeled school resource officers or not, police officers assigned to schools are law enforcement officers. As the Tennessee Supreme Court recognized, "[s]chool officials and law enforcement officers play fundamentally different roles in our society."[131] In spite of all the talk about teaching and mentoring students, when the going gets tough most SRO's are going to fall back "on doing what they *were* trained to do and [what they] know how to do—enforce the law."[132] When they detain, question, and arrest those who violate school rules they "function as adversaries" of the students.[133] They collect evidence that can be used against students in courts of law and along the way, students are transformed into criminals. When such evidence is obtained through a search justified by a reasonable suspicion, students get the worst of both worlds:

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clothing based on a tip provided by a police detective because the police never explicitly requested the search be done); People v. Alexander B., 270 Cal. Rptr. 342, 343–44 (Cal. Ct. App. 3d 1990) (finding that reasonable suspicion applies to searches if the investigation is initiated by a school official); J.A.R. v. State, 689 So. 2d 1242, 1244 (Fla. Dist. Ct. App. 1997) (applying the reasonable suspicion to a search conducted by school resource officer who was informed that a child carried a gun to school). It should be noted, however, that courts do require probable cause where outside police officers initiate a search or where school officials act at the behest of law enforcement officers not associated with the school. R.D.S. v. State, 245 S.W.3d 356, 369 (Tenn. 2008) (recognizing that traditional law enforcement officers must have probable cause to search students); F.P. v. State, 528 So. 2d 1253, 1254 (Fla. Dist. Ct. App. 1988) (applying probable cause to a search performed by a school resource officer at the behest of a law officer unassigned to the school system); *In re* Josue T., 989 P. 2d 431, 437 (N.M. Ct. App. 1999) (pronouncing that reasonable suspicion is the appropriate standard for searches conducted by school resource officers because such officers are acting as "the arm of the school official"); State v. Tywayne H., 933 P.2d 251, 254 (N.M. Ct. App. 1997) (applying probable cause where search of student was "conducted completely at the discretion of the police officers"); *In re* of Thomas B.D, 486 S.E.2d 498, 500 (S.C. Ct. App. 1997) (requiring probable cause when police conducted a search in furtherance of law enforcement objective, rather than on behalf of school).

129. *See, e.g.*, People v. Dilworth, 661 N.E.2d 310, 317 (Ill. 1996) (holding that a search of a student by a public school "liaison police officer" was permissible); *In re* S.F., 607 A.2d 793, 794 (Pa. Super. Ct. 1992) (applying the reasonable suspicion standard to a search conducted by a plainclothes police officer for the school district). *But see* A.J.M. v. State, 617 So. 2d 1137, 1138 (Fla. Dist. Ct. App. 1993) (ruling that a school resource officer must have probable cause to conduct a search).

130. *In re L.A.*, 21 P.3d at 960–61.

131. *R.D.S.*, 245 S.W.3d at 368.

132. FINN ET AL., *supra* note 116, at 13.

133. *See* New Jersey v. T.L.O., 469 U.S. 325, 349 (1985) (Powell, J., concurring) (referencing the role of law enforcement generally as being adversarial).

they face the full panoply of sanctions and punishments under the juvenile or criminal justice systems, but without the constitutional protections that normally adhere to such proceedings.

C. *Les Leçons Dangereuses*[134]

Schoolchildren are criminalized in other ways as well. Metal detectors greet them as they enter the building.[135] Once inside, they are not only under the watchful eye of uniformed and armed SROs but also under constant video surveillance.[136] Schools conduct random sweeps for contraband.[137] Dogs are brought to school, sniffing for drugs.[138] And draco-

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134. Translated this means the dangerous lessons. *Les Leçons Dangereuses* is also the French name of a 2004 made for television movie, *Fatal Lessons: The Good Teacher. Dangerous Lessons: The Movie*, NOTRECINEMA.COM, http://www.notrecinema.com/communaute/v1_detail_film.php3?lefilm=32759 (last visited Nov. 5, 2011).

135. *Indicators of School Crime and Safety: 2008 - Indicator 20: Safety and Security Measures Taken by Public Schools*, INST. OF EDUC. SCI., U.S. DEP'T OF EDUC., http://nces.ed.gov/programs/crimeindicators/crimeindicators2008/ind_20.asp [hereinafter *Indicators of School Crime*]. Metal detectors and other security devices in schools are designed to "monitor or restrict students' and visitors' behavior on campus." *Id.*

136. Between the 1999–2000 and 2005–06 school years, the percentage of schools using one or more security cameras to monitor the school increased from [nineteen] to [forty-three] percent. *Id. See generally* ELORA MUKHERJEE, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY PUBLIC SCHOOLS, N.Y. CIV. LIBERTIES UNION (2007), *available at* http://www.nyclu.org/pdfs/criminalizing_the_classroom_report.pdf (asserting that "[New York] City schools feel more like juvenile detention facilities than learning environments"); Jen Weiss, "*Eyes on Me Regardless*": *Youth Responses to High School Surveillance,* 21 EDUC. FOUND. 47 (2007) (discussing students' thoughts on video surveillance and security in schools); Dominique Braggs, *Webcams in Classrooms: How Far is Too Far?,* 33 J.L. & EDUC. 275, 276 (2004) ("By the 1999–2000 school year, [fifteen percent] of public schools nationwide reported using some form of video surveillance."); *ACLU Protests Cameras in Colorado Schools,* ACLU, Jan. 25, 2001, *available at* http://www.aclu.org/Privacy/Privacy.cfm?ID=6962&c=130 (noting that proposed surveillance cameras for the Boulder [Colorado] Valley School District would cost up to $840,000); Press Release, ACLU, ACLU Asks Arizona School District to Reject Face-Recognition Checkpoints (Dec. 17, 2003), *available at* http://www.aclu.org/news/newsprint.cfm?ID=14598&c=253 (providing that a face-recognition system is being installed to identify sex offenders and missing children who visit the school); Graeme Zielinski & Christine B. Whelan, *Fauquier to Use Cameras to Keep Eye on Students,* WASH. POST, Aug. 6, 2000, at B1 (reporting the installation of $60,000 worth of cameras in Fauquier County, Virginia schools "even though there has been no serious violence at [district schools] in recent years").

137. *Indicators of School Crime*, *supra* note 135.

138. *Id.* Sixty-one percent of high schools reported performing random checks for drugs using dogs. *Id. See, e.g.*, Candice Williams & Santiago Esparza*, Grosse Pointe School Searched for Drugs,* DETROIT NEWS Apr. 29, 2010, at A8 (reporting that drug paraphernalia was found during a surprise lock-down and sweep of an area high school in which nine police dogs were used); Allison Manning, *Rockland High Searched for Drugs and Guns; One Student Fined for Having Marijuana*, PATRIOTLEDGER.COM (Quincy,

nian zero-tolerance policies subject violators to harsh punishments such as suspension or expulsion regardless of the circumstances.[139] In conjunction with the lowered expectations of privacy embodied in the reasonable suspicion standard, such policies foster an authoritarian environment that is more like a prison than a place of learning and where the lessons that are learned are ones of fear and control.[140] "'Schools are where children learn their role in society. Now children are learning that they should always expect to have police around, and they can't necessarily expect fairness.'"[141]

As Justice Steven points out in his dissent in *T.L.O.*:

> The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The

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Mass.) Mar. 18, 2010, http://www.patriotledger.com/news/cops_and_courts/x1514354744/Rockland-High-searched-for-drugs-and-guns-one-student-fined-for-having-marijuana. (reporting that a sweep for drugs and guns involving sixteen police dogs resulted in one discovery of a small quantity of marijuana); Nate Schwerber, *Drug Sniffing Dogs Patrol More Schools*, N.Y. TIMES Mar. 20, 2009, http://www.nytimes.com/2009/03/22/nyregion/long-island/22Rsniff.html (reporting on a presentation in which the abilities of drug-sniffing dogs were demonstrated to students); Christian Nolan, *Parents Raise Stink Over Drug-Sniffing Dogs*; *But State Court Rules That School Sweeps are Not Unconstitutional,* CONNECTICUT LAW TRIBUNE, Oct. 9, 2009, at 6 (discussing the ruling which found that using dogs to conduct sweeps for drugs in lockers and cars was not unconstitutional); Ruth Teichroeb, *Stanford Examining High School Drug Bust,* SEATTLE POST-INTELLIGENCER Jan. 22, 1998, at B2 (reporting that a school district was considering using dogs to sniff for drugs following the on-campus arrest of a student with $1000 worth of crack cocaine); Letter, Jay A. Miller, *Dogs in Schools Provide Poor Lesson,* CHI. TRIB. May 10, 1990, at C24 (noting that dogs falsely alerted to a student who had recently played with her own dog and to female students who were menstruating; based on the false positive, the students were strip searched); Colin Gustafson, *Police With Drug-Sniffing Dogs to Patrol GHS*, STAMFORD ADVOCATE (Conn.) Jan. 22, 2010, http://www.stamfordadvocate.com/news/article/Police-with-drug-sniffing-dogs-to-patrol-GHS-332820.php (noting that searches with police dogs would continue because "this [the school] is a zero-tolerance environment").

139. Henry Giroux, *Mis/Education and Zero Tolerance: Disposable Youth and the Politics of Domestic Militarization*, BOUNDARY 2, Fall 2001, at 61, 89. "Zero tolerance laws make it easier to expel students then for school administrators to work with parents, community justice programs, religious organizations, and social service agencies. Moreover, automatic expulsion policies do "little to produce a safer school . . . ." *Id.* at 87

140. *Id.* (noting that "most of the high-profile zero-tolerance cases . . . often involve African-American students"). *Id.* at 87.

141. Polly Schullman, *Responding to Violence in Schools,* SCIENCE CAREERS May 4, 2007 (quoting sociologist Aaron Kupchik).

> Court's decision today is a curious moral for the Nation's youth. Although the search of T. L. O.'s purse does not trouble today's majority, I submit that we are not dealing with "matters relatively trivial to the welfare of the Nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."[142]

The concern that Justice Stevens voices in his dissent is even more pressing in light of the expanding role of law enforcement officers and other tools of control utilized by public schools that result in the criminalization of students. The lowered standard for searches set forth by *T.L.O.* and reiterated by its progeny reduces constitutional freedoms of the individual to an empty guarantee. Reasonable suspicion exacerbates the "conflict between establishing an environment for the transmission of democratic values and the mixed message sent to the nation's youth that order and discipline are given more emphasis than their individual rights."[143] For public school students, the government not only intrudes on their personal privacy without a warrant or compelling circumstance, but does so with the sanction of the very institutions that are charged with the responsibility of "awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[144] A student can be taught a lesson about the Fourth Amendment's protections against search and seizure in the morning, forced to submit to a search in the afternoon, and charged with a crime resulting from that search the following day.[145] Disciplinary regimes that fail to value or adequately recognize a student's autonomy and individual liberty "strangle the free mind at its source" by "teach[ing]

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142. New Jersey v. T.L.O., 469 U.S. 325, 385 (1985) (Stevens, J., dissenting) (quoting West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943)).

143. Traci B. Edwards, Note, *Shedding Their Rights at the Schoolhouse Gate: Recent Supreme Court Cases Have Severely Restricted the Constitutional Rights Available to Public School Children*, 14 OKLA. CITY U. L. REV. 97, 98–99 (1989). "The goal of public education is to instill democratic values while maintaining order and discipline. But in protecting that goal, courts send undemocratic signals to school students when they limit the constitutional protections available to them." *Id.* at 99.

144. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (finding that "where the state has undertaken to provide [education, it] is a right which must be made available to all on equal terms").

145. However, following No Child Left Behind, forty-four percent of school districts report reducing time spent on classes such as social studies. Jennifer McMurrer, *Choices, Changes, and Challenges; Curriculum and Instruction in the NCLB Era,* CENTER ON EDUC. POL'Y, Dec. 2007, at 3.

youth to discount important principles of our government as mere platitudes."[146]

Instead of nurturing, protecting, and educating children, public schools are teaching youth three dangerous lessons when we strip them of the full protection afforded by the Fourth Amendment. First, compromising notions of freedom and personhood contained in the Constitution erode its normative significance and leads to a belief that the "cherished ideal" of the Fourth Amendment is either meaningless or illusory. This teaches students that they are somehow unworthy or undeserving of its full protection. For socially and economically disadvantaged students (who are more likely to attend large, inner-city schools where police presence is high and security measures are harsh) this lesson is particularly harmful because it perpetuates the social expectations that have marginalized their communities for decades.

Second, creating second-class rights creates second-class citizens with lowered expectations of privacy. "An encounter pursuant to an expansive school search policy or statute is likely to impress upon a student that he or she is inherently untrustworthy or that people who have authority may wield it without regard to individual liberties."[147] Without a sound understanding of such a basic percept of American democracy, such individuals are less capable of knowing when their rights have been violated or resisting a violation before it happens, even when they leave the school setting. Thus, they are ill prepared for citizenship but well prepared for penal institutions where only minimal individual rights are afforded. "Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms."[148]

Third, children who are subjected to school searches may feel that the law is unfair as applied to them because adults in positions of authority have treated them with distrust and disrespect. In turn, youth develop negative views of school and distrust of law enforcement that alienates them from mainstream society, increasing the lure of counter-culture ideas (such as gangs and other anti-social groups). As Justice Powell stated in *T.L.O.*:

> Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing

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146. *Barnette,* 319 U.S. at 637. The Court held that students in public schools could not be forced to salute the American flag nor recite the Pledge of Allegiance. *Id.* at 642.

147. Bates McIntyre, Note, *Empowering Schools to Search: The Effect of Growing Drug and Violence Concerns on American Schools,* 2000 U. ILL. L. REV. 1025, 1049 (2000).

148. Doe v. Renfrow, 451 U.S. 1022, 1027–28 (1981) (Brennan, J., dissenting from denial of certiorari).

> citizenry. If the Nation's Students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have been dealt with unfairly.[149]

This causes a crisis of legitimacy under which the rule of law, which is viewed as unjust, is disregarded in favor or street codes of honor, respect, and loyalty.

Subjecting young people to the humiliation of seemingly arbitrary searches—while at school—chips away at their dignity and self-respect.[150] "State-operated schools may not operate as enclaves of totalitarianism where students are searched at the caprice of school officials . . . [s]tudents look to teachers, school administrators, and others in positions of authority as models for their own behavior and development into responsible adults."[151] Reasonable suspicion, increased presence of law enforcement, and other disciplinary policies that criminalize adolescent behavior transforms schools into places where students are treated like threatening figures that must be carefully regulated in order to maintain safety and order. Youth are given very little room to engage in conduct that is normal and developmentally appropriate, such as experimenting with different identities, risk-taking, and challenging adults or persons of authority.[152] Instead, they are expected to conform to unrealistic behavioral objectives or face harsh consequences.[153]

Students who are searched under a reasonable suspicion standard may face suspension, expulsion, or even a referral to juvenile or criminal court as a result of the search.[154] Perhaps even worse is the shame, humiliation,

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149. New Jersey v. T.L.O., 469 U.S. 325, 373–74 (1985) (Powell, J., concurring).

150. *See, e.g.*, Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 974 (1964) (describing how intrusion may harm human dignity); Note, *Formalism, Legal Realism and Constitutionally Protected Privacy Under the Fourth & Fifth Amendments*, 90 HARV. L. REV. 945, 987 (1977) ("The right to privacy [in the Fourth Amendment] deserves primary recognition . . . because of its close connection with the uniqueness of the person and human dignity.").

151. Jones v. Latexo Indep. School Dist., 499 F. Supp. 223, 236, 239 (E.D. Tex. 1980).

152. *See* Jeffery Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507, 516 (1999) (describing the developmental processes of adolescence).

153. DANIEL J. LOSEN & RUSSELL J. SKIBA, S. POVERTY LAW CENTER, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2, 9 (2010) (demonstrating that "[s]ince the early 1970s, out-of-school suspension rates have escalated dramatically"). This is due:

> In part, the higher use of out-of-school suspension reflects the growth of policies such as "zero tolerance," an approach to school discipline that imposes removal from school for a broad array of school code violations - from violent behavior to truancy and dress code violations," and explaining that most suspensions result from "non-violent, less disruptive offenses," such as using offensive language, cutting class, tardiness, truancy, disobedience, disrespect, and "general classroom disruption."

154. *Id.* There is little empirical evidence regarding the number of suspension, expulsions, and referrals to juvenile court that are based on evidence recovered during non-

and loss of dignity that a student may feel regardless of the outcome of the search.[155] The expectation that students can "shed their constitutional rights . . . at the schoolhouse gate" without suffering negative developmental outcomes is unrealistic.[156] It does not account for the specific developmental context of adolescence and the important role of school as a socializing institution.

D. *How Age Gets Lost in the* T.L.O. *Inquiry*

Not only is high school an important time because "[t]he schoolroom is the first opportunity most citizens have to experience the power of government," but also because the teenage years are crucial to the psychosocial, cognitive and neurological development of human beings.[157] The lessons that are being taught by watered-down constitutional rights and authoritarian security measures are all the more dangerous because of the unique vulnerabilities of the adolescent mind. While this is discussed further below, it is important to note here that age is an important factor for reasons that are based in science and are gaining recognition in constitutional jurisprudence.

The *T.L.O.* Court itself explicitly cites age as a factor in determining the reasonableness of a search. As discussed above, the reasonableness of a school search is determined by the two-prong *Terry* inquiry. The Court states:

> [A] search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not exces-

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consensual searches of students. *But see, id.* at 24 n.1 (stating that most incidents involving students bringing drugs, a weapon, or anything that would pose a threat to students usually results in expulsion).

155. Randall R. Beger, *The "Worst of Both Worlds": School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 340 (2003) (documenting studies suggesting that intrusive school searches "produce alienation and mistrust among students . . . disrupt the learning environment and create an adversarial relationship between school officials and students . . . [and] may actually interfere with student learning").

156. Tinker vs. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (indicating that given the "special characteristics of the school environment," constitutional protections such as the First Amendment "are available to teachers and students").

157. New Jersey v. T.L.O., 469 U.S. 325, 385 (1985) (Stevens, J., dissenting).

> sively intrusive in light of the *age* and sex of the student and the nature of the infraction.[158]

The requirement that school searches not be "excessively intrusive in light of the age and sex of the student and the nature of the infraction,"[159] is a small, but important addition to *Terry's* two-part inquiry.

Terry does not require police to consider whether a search is excessively intrusive in light of the age (or sex, for that matter) of the suspect.[160] This language indicates the Court was aware that there is something different about schoolchildren, and that age plays a role in this difference. However, the Court does not elaborate on this or give any guidance as to how the age component should be factored into the reasonableness determination.In fact, it is never mentioned again in the opinion.

None of the school search cases following *T.L.O.* elucidate on how or why age should be accounted for when determining the permissible scope of a search.[161] The cases involving suspicionless drug testing of students do not even raise the issue. In these cases, the Court finds the character of the intrusion is "negligible" and "minimal," thus obviating further discussion of the permissible scope.[162] *Redding* does inject age back into the discussion, acknowledging that "adolescent vulnerability intensifies the exposure's patent intrusiveness."[163] However, as in *T.L.O.* there is no meaningful discussion of age as a factor. Why should the age of a student even be considered? Is the age limitation placed on the permissible scope of a search related to students' privacy or liberty interests? Should constitutional protections increase or decrease as the student gets older?

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158. *Id.* at 342 (emphasis added).

159. *Id.*

160. Terry v. Ohio, 392 U.S. 1, 20 (1968). In determining the validity of a search, a court considers "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*

161. *E.g.*, Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. __, 129 S. Ct. 2633, 2644 (2009) (holding that the strip search of a thirteen-year-old student was unreasonable and a violation of the Fourth Amendment); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty v. Earls, 536 U.S. 822 (2002) (holding public high school policy of suspicionless drug testing of students participating in extracurricular activities was reasonable and did not violate the Fourth Amendment); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995) (holding the school district's suspicionless drug testing program of student athletes was reasonable and, therefore, constitutional under the Fourth Amendment).

162. *Acton*, 515 U.S. at 658. "Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible." *Id.* "Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant." *Earls*, 536 U.S. at 834.

163. *Redding*, 557 U.S., at __, 129 S. Ct. at 2636.

The Court cites to a brief by the National Association of Social Workers (NASW), the substance of the brief explains why age is an important factor to consider when determining the reasonableness of a search and called for a new "framework to analyze . . . reasonableness," but it was not incorporated into the Court's discussion or analysis.[164] Thus, while the *Redding* Court had the opportunity to reexamine the *T.L.O.* framework it chose not to. Nevertheless, although the balance between the state's interest in school safety and the students' privacy interest remains unchanged, at least the Court does reiterate that age is a factor when determining the permissible scope of a search.[165]

Even though *Redding* involves a search that is deemed "categorically distinct" from searches of "outer clothing and belongings,"[166] hopefully the age-based developmental distinctions raised by the NASW amicus brief will resurface in future school search cases considered by the Court, meriting a more meaningful analysis of age as a factor. In Part III below, I explore these developmental differences by first examining the scientific research and then focusing on how the Supreme Court has incorporated this research into its constitutional jurisprudence. This discussion lays the groundwork for the first part of my ultimate inquiry: whether a different framework for analyzing the reasonableness of school searches is more developmentally appropriate. After considering the science of adolescent brain development I will turn to the role of public education in advancing positive youth development and democratic socialization through increased privacy rights for students.

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164. Brief for Nat'l. Assn. Soc. Workers et al. as Amici Curiae Supporting Respondent at 5, *Redding*, 557 U.S. __, 129 S. Ct. 2633 (No. 08-479), 2009 WL 870022 (recognizing the difference in development between children and youth from adults, therefore requiring different treatment). The brief states:

> "[C]hildren are not just short adults . . . children and youth are developmentally different from adults and must be treated appropriately." Here, those developmental differences require not only a different framework to analyze the reasonableness of Fourth Amendment searches, but also a clear understanding of the effects of excessively intrusive searches on children and youth.

Id. (internal citation omitted). *See Redding*, 557 U.S. at __, 129 S. Ct. at 2641 (holding that the principal had reasonable suspicion, however his suspicion did not justify a strip search).

165. *Id.* at 2642 (citing New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)). The court writes:

> [T]he rule of reasonableness as stated in *T.L.O.*, [requires that] "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." . . . The scope will be permissible . . . when it is "not exceedingly intrusive in light of the age . . . of the student and the nature of the infraction."

Id.

166. *Id.* at 2641.

III. Youth Development and the Law: We're Not in Jersey Anymore

Caterpillar: "Who are YOU?"
Alice: This was not an encouraging opening for a conversation.
"I—I hardly know, sir, just at present—at least I know who I was when I got up this morning, but I think I must have been changed several times since then."[167]

The law has both embraced and rejected the concept of adolescence as a unique developmental phase requiring a separate theoretical approach for adolescents and adults. The creation of a separate system of juvenile justice exemplifies a recognition that adolescents are developmentally different than adults and must be treated accordingly.[168] The wave of state legislation in the 1990s that "abandoned or reduced the traditional discretionary-waiver authority of juvenile courts" represents an opposing view that teenagers are not only dangerous and violent but also responsible enough to be punished in a manner similar to adult offenders.[169] Rather than science, both approaches have been undergirded by "[c]ommon sense and casual observation" which, regardless of the approach, there is justification to enforce protectionist policies aimed at regulating adolescent behavior.[170]

More recently, the paternalistic lens through which children, including adolescents, have been viewed by the law is shifting into a paradigm of increased autonomy, rights, and dignity for youth.[171] The developmental

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167. Lewis Carroll, Alice's Adventures in Wonderland, and Through the Looking Glass 38 (Lothrop Publ'g Co. 1898).

168. Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 Notre Dame L. Rev. 89, 95 (2009). "Theories of adolescence as a developmental stage importantly distinct from both childhood and adulthood always have been central to juvenile justice, underlying not only the core idea—that of having a separate system at all—but also the attributes of that system." *Id.*

169. See Gregory A. Loken & David Rosettenstein, The Juvenile Justice Counter-Reformation: Children and Adolescents as Adult Criminals, 18 quinnipiac l. rev. 351, 352, 362 (1999) (noting the reformation in the juvenile justice system from being "essentially a child welfare system" to one that is now structured with a "punitive character"). *See also*, Emily Ray, Comment, *Waiver, Certification, and Transfer of Juveniles to Adult Court: Limiting Transfer in Texas*, 13 Scholar 317, 319 (2011) (arguing that "[t]ransfer . . . is not only detnmental to the minor . . . but harmful to sociey as a whole").

170. Kim Taylor-Thompson, *States of Mind/States of Development*, 14 Stan. L. & Pol'y Rev. 143, 146–48 (2003); *see also* Annette Appell, *The Pre-Political Child of Child Centered Jurisprudence*, 46 Hous. L. Rev. 703, 709 (2009) (discussing how the legal regulation of childhood is shaped by developmental aspects of the category of childhood such as poor decision making skills, impulsivity, and vulnerability).

171. *See generally* Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Docs. A/44/736, at 5, A/44/736/CORR.1 (Nov. 20, 1989), *available at* http://documents-dds-

differences between adolescents and adults, once based in common sense, are now documented by behavioral and criminological research.[172] There is a consensus among researchers that the transition to adulthood is a time of profound growth, change and development.[173] The attributes of youth, which once led policy makers to restrict rights, have become the basis for an expansion of rights in certain areas.[174] In particular, constitutional protections that are predicated on "evolving standards" have been

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ny.un.org/doc/UNDOC/GEN/N89/292/45/img/N8929245.pdf?OpenElement. (setting out the political, economic, civil, social, cultural, and health rights of children). "Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity." *Id. See also* Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Any Miracles*, 20 EMORY INT'L L. REV. 43, 44–45 (2006) (discussing the benefits of the convention). Guggenheim asserts that:

> American children possess an abundance of rights. The largest number and kinds of rights they possess are statutory in nature and commonly enacted by state and local legislatures. But even if we focus solely on rights recognized by the Supreme Court of the United States, children enjoy almost all of the rights that adults are guaranteed by the Constitution.

Id.

172. *See, e.g.*, Mary Beckman, *Crime, Culpability and the Adolescent Brain*, 305 SCI. 596, 596–99 (2004) (discussing the capacity for adolescents to commit crimes, and noting that structurally the brain is still maturing during adolescence); L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVIEWS 417, 417 (2000) (analyzing the different maturational changes in the brain of adolescent that contribute to their behavioral characteristics including an increase in inclination to use drugs); Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCI. 69, 69–74 (2005) (analyzing adolescent behaviors under new knowledge of brain developments).

173. *See, e.g.*, Jay Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861 (1999) [hereinafter *Brain Development*] (illustrating the results of an MRI study that analyzed different types of brain matter); T. Paus et al., *Maturation of White Matter in the Human Brain: A Review of Magnetic Resonance Studies,* 54 BRAIN RESONANCE BULL. 255, 255 (2001) (explaining that "age-related changes in white matter continue during childhood and adolescence"); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. OF NEUROSCIENCE 8819, 8819 (2001) (explaining that MRI's of brain maturation during adolescence show that there are subtle increases in both brain volume and white matter at that time).

174. S*ee generally* Roper v. Simmons*,* 543 U.S. 551, 553 (2005) (holding that the Eighth Amendment's ban on cruel and unusual punishment extends to prohibit the death penalty for crimes which are committed when an individual is under eighteen years old); Graham v, Florida, 560 U.S. __, 130 S. Ct. 2011, 2034 (2010) (holding that the Eighth Amendment's ban on cruel and unusual punishment prohibits imposing a sentence of life without parole on juvenile offenders who did not commit homicide). Additionally, the Court stated that States must give juvenile non-homicide offenders who are sentenced to life without parole a chance to obtain release. *Id.*

adjusted to better account for developmental psychology and the science of adolescent brain development. *Roper v. Simmons*[175] and *Graham v. Florida*[176] are two recent Supreme Court cases that have advanced the constitutional rights of children under the Eight Amendment through a new appreciation of the vulnerabilities associated with adolescence due to structural and functional differences in the brain that influence behavior.[177] Even more recently, the Court has recognized that age informs the Fifth Amendment analysis of what constitutes custody under *Miranda* in *J.D.B. v. North Carolina*.[178]

Similar to the Eighth Amendment, the Fourth Amendment's reasonableness requirement is an evolving standard that has changed over time to conform to societal norms.[179] Can the cognitive, psychosocial, and neurological vulnerabilities demonstrated through scientific research and recognized by the Court in *Simmons* and *Graham* be incorporated into the constitutional framework for school searches? Should age inform the Fourth Amendment reasonableness analysis like it informs the Fifth Amendment custody analysis? The Part below looks at the science and the case law which is the foundation for the subsequent discussion regarding a developmental approach to school searches.

The Supreme Court's reliance on adolescent brain development studies and developmental psychology in connection with the Eighth Amendment's prohibition on cruel and unusual punishment has generated considerable scholarship in the area of juvenile justice.[180] Other scholars have explored the impact of adolescent brain development on the Fifth Amendment rights of juveniles.[181] Much of the scholarship focuses on

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175. 543 U.S. 551 (2005).

176. 560 U.S. __, 130 S. Ct. 2011 (2010).

177. *Simmons*, 543 U.S. 551; *Graham*, 560 U.S. at __, 130 S. Ct. at 2026.

178. *See* J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394, 2399 (2011) (holding that "a child's age properly informs the *Miranda* custody analysis").

179. *See* FLORIDA v. RILEY, 488 U.S. 445, 454–55 (1989) (O'Connor, J., concurring) (acknowledging the fluid nature of the reasonable expectation of privacy depends on what "society is prepared to recognize as 'reasonable' ") (quoting KATZ v. UNITED STATES, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

180. *See generally* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 28–60 (2008) (discussing how crime involvement by teenagers is related to adolescent development).

181. *See, e.g.*, Tamar R. Birckhead, *The Age of the Child: Interrogating Juveniles After* Roper v. Simmons, 65 WASH & LEE L. REV. 385, 397 (2008) (explaining that adolescents lack the same maturity as adults); Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 74 (2006) (asserting that adolescents typically are more inclined to waive their rights because they think it is a more natural course of action); Ellen Marrus, *Can I Talk Now?: Why* Miranda *Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515, 516 (2006) (explaining that the differences in development between children and adults should entitle

the competence and culpability of juveniles in the context of criminal law or criminal procedure. However, neuroscience and psychology may have limited application in these areas because of "equality and autonomy concerns" to which "no adequate limiting principle has yet been articulated."[182]

In the context of the Fourth Amendment, the primary concern is not competence or culpability, but susceptibility.[183] If, as the science suggests, the human brain is being hardwired during adolescence, to what extent can students' individual liberties be encroached upon by the government without sacrificing positive youth development?[184] Therefore, instead of militating against individual autonomy, a Fourth Amendment framework that is developmentally appropriate would actually afford adolescents greater autonomy and equality by freeing them from unjust suspicion and arbitrary interference with their privacy. Moreover, while most scholars argue that adolescents should be treated differently than adults, in regards to the Fourth Amendment adolescents should be treated *at least* as equally as adults. This approach does not posit that adolescents should have rights co-extensive to adults because they are the same as adults. Rather, recognizing the developmental uniqueness of adolescents dictates the consideration of factors beyond privacy and school safety when applying the Fourth Amendment to high school students.

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them to more constitutional protection); Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 62 (2007) (explaining how adolescents tend to be more immature than adults and that is explained by both cognitive and psychological development).

182. Maroney, *supra* note 168, at 118.

183. *See* Diana R. Donahoe, *Strip Searches of Students: Addressing the Undressing of Children in Schools and Redressing the Fourth Amendment Violations*, 75 MO. L. REV. 1123, 1160 (2010) (describing the susceptibility of students to unreasonable searches and seizure under the current reasonable suspicions standard in school searches); *see also* N.G. v. Connecticut, 382 F.3d 225, 239 (2d Cir. 2004) (Sotomayor, J., dissenting) (expressing concern regarding the strip searches of two female juveniles because "youth 'is a time and condition of life when a person may be most susceptible to influence and to psychological damage'") (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)); Jonathan M. Ettman, Vernonia *Case Comment: High School Students Lose Their Rights When They Don Their Uniforms*, 13 N.Y.L. SCH. J. HUM. RTS. 625, 639 (1997) (stating that since students are not afforded the same Fourth Amendment protection as adults, they are "more susceptible to intrusive measures").

184. *See* Spinks, *supra* note 26 (discussing the way teens' brains develop).

A. *The Science*

i. The Old

Conventional wisdom has always recognized that adolescence is a turbulent time.[185] Teenagers are notoriously moody, immature, and prone to risk taking.[186] Despite this, until recently, most neuroscientists believed that the human brain underwent the most significant changes very early in life, during early childhood.[187] Studies of brain tissues from younger individuals showed that newborns had synaptic densities equal to that of adults, and that density steadily increased during the first two years of life until it was fifty percent greater than that of adults.[188] It was believed that the synaptic density then decreased between ages two and sixteen, and remained largely constant from age sixteen to seventy-two.[189] Similarly, it was believed that neuronal density was very high in newborns, declining steeply during the first six months of life, and then continuing to decline throughout infancy and childhood.[190] These results led researchers to conclude that the brain was fully grown by age seven,

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185. *Eddings*, 455 U.S. at 115 n.11. "[A]dolescents . . . are more vulnerable, more impulsive, and less self-disciplined than adults." *Id.*

186. COALITION FOR JUVENILE JUSTICE, WHAT ARE THE IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT FOR JUVENILE JUSTICE 3 (2006), *available at* http://www.juvjustice.org/media/resources/public/resource_138.pdf.

187. *See* Jay D. Aronson, *Brain Imaging, Culpability and the Juvenile Death Penalty*, 13 PSYCHOL. PUB. POL'Y & L. 115, 119 (2007) (explaining that "[f]or most of the 20th century, experts believed that the most important period for human brain development was the first 3 years of a person's life"); Catherine Sebastian*, The Second Decade: What Can We Do About the Adolescent Brain?*, OPTICON1826, Spring 2007, at 1, *available at* http://www.ucl.ac.uk/opticon1826/archive/issue2/VfPLIFE_Teenagers.pdf (discussing how both white and grey matter continue to develop into early adulthood).

188. *See* Patricia S. Goldman-Rakic et al., *Synaptic Substrate of Cognitive Development: Synaptogenesis in the Prefrontal Cortex of the Nonhuman Primate*, *in* DEVELOPMENT OF THE PREFRONTAL CORTEX: EVOLUTION, NEUROBIOLOGY, AND BEHAVIOR 27 (1997) (explaining that usually, nerve cells are not in direct physical contact). There are microscopic gaps between nerve cells called synapses. *Id.* Communication between nerve cells takes place across synapses. *Id.* "The synaptic architecture of the cerebral cortex defines the limits of intellectual capacity, and the formation of appropriate synapses is the ultimate step in establishing these functional limits." *Id.*

189. Kevin W. Saunders, A *Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences and Juvenile Justice*, 2005 UTAH L. REV. 695, 704–05 (2005) (citing Peter R. Huttenlocher, *Synaptic Density in Human Frontal Cortex— Developmental Changes and Effects of Aging*, 163 BRAIN RES. 195, 203 (1979)). *See generally* Sharon Begley, *Your Child's Brain*, NEWSWEEK, Feb. 19, 1996, at 54 (summarizing brain development research supporting the view that the most significant stages of brain development occurred between birth and three years of age).

190. *See* NEUROBIOLOGY OF MENTAL ILLNESS 300 (Dennis S. Charney & Eric J. Nestler eds., 2d ed. 2004) (explaining that neuronal density refers to the ratio between nerve cells and other non-nerve cells in the human brain).

and the fact that synaptic density was still higher than in the adult brain meant that from age seven on, synapses would gradually be lost through a process of pruning, by which unused or nonfunctioning synapses would degenerate.[191] Under this theory, teenagers were, at least developmentally, identical to adults.

ii. The New

Before developments in technology, research was limited to studying teenage brains post mortem.[192] Even when MRI technology made it possible for researchers to analyze the brains of living individuals, lingering concerns over the safety of exposing younger subjects to MRIs meant that it wasn't until the 1990s when the NIH approved such studies that data could be collected in younger children.[193] When these studies were finally performed, they revealed that although the pruning process did occur in childhood, there was also a secondary period of rapid development around puberty, with gradual pruning occurring through adolescence and into young adulthood.[194]

In particular, the research showed that there are increases in cortical gray matter[195] during the preadolescent years, with a subsequent de-

191. Saunders, *supra* note 189 (referencing a study conducted by Peter R. Huttenlocher, in which he examined the brain tissue of twenty-one normal human beings varying in age, from newborns to those ninety years old).

192. Interview by *PBS Frontline* with Kurt Fischer, Director, Harvard's Mind, Brain & Education Program, *Inside the Teenage Brain*: *How Much Do We Know About the Brain,* PBSFRONTLINE.ORG, http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/how.html (last visited Nov. 6, 2011) (indicating that "[m]ost of the recent advances in brain science have involved knowledge of the biology of single neurons and synapses, not knowledge of patterns of connections and other aspects of the brain as a system").

193. *See generally* Alan C. Evans, *The NIH MRI Study of Normal Brain Development*, NEUROIMAGE 30, 184–98 (Jan. 11, 2006) (providing support for the notion that MRIs are safe to use on young children).

194. *See, e.g.*, Jay N. Geidd, *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335, 340 (2008) [hereinafter *The Teen Brain*] (recognizing that brain development continues even through adolescence); *Brain Development, supra* note 173, at 861–63 (finding that "maximum size [of temporal-lobe gray matter] was not reached until 16.5 years for males and 16.7 years for females"); Sowell et al., *supra* note 173, at 8826 (identifying that myelination and pruning occur simultaneously during adolescence); Elizabeth R. Sowell et al., *In Vivo Evidence for Post-adolescent Brain Maturation in Frontal and Striatal Regions*, NATURE NEUROSCIENCE 860 (1999) [hereinafter *In Vivo Evidence*] (reporting a "reduction in gray matter between adolescence and adulthood, probably reflecting increased myelination . . . that may improve cognitive processing adulthood").

195. *See* DALE PURVES, BRAINS: HOW THEY SEEM TO WORK 91 (2010) (noting that the cerebral cortex is a sheet of neural tissue that is outermost layer of the human brain, which is composed of gray matter); Paus et al., *supra* note 173, at 258 (illustrating the amount of white matter in the brain at different stages of life).

crease after adolescence.[196] In the frontal lobes, which are involved with response inhibition, emotional regulation, planning and organization, there is a reduction in gray matter between adolescence and adulthood that is due to intensive pruning of neural connections.[197] The prefrontal cortex, which is thought to be involved in goal directed behaviors, such as rule learning, and emotional processing also experiences considerable remodeling of nerve connections during this same time period.[198]

Concurrently, the adolescent brain undergoes significant myelination, wherein connections between nerve cells (axons) are insulated by a substance called myelin, which is also known as "white matter."[199] This streamlines the connections inside the brain by increasing the speed at which impulses can travel along the nerve cell.[200] As part of the myelination process, neural connections between the frontal regions of the brain and the amygdala (a part of the limbic system that is responsible for impulse reactions including emotional processing of fear) become denser as emotional and cognitive processes are integrated.[201] Thus, while grey matter decreases during adolescence, white matter increases.[202] Dr. Jay Giedd, a lead researcher in longitudinal neuroimaging studies of the adolescent brain, refers to this as the "use it or lose it principle" because the brain is pruning back unused nerve connections and strengthening used connections to make them more effective.[203] Thus, the rapid growth, pruning, and myelination that occurs inside the adolescent brain, referred to as neuromaturation, affects the way adolescents process information

196. Sowell et al., *supra* note 173.

197. *See Brain Development*, *supra* note 173, at 861 (noting that changes in cortical gray matter in the frontal lobe peaks around age twelve); *In Vivo Evidence, supra* note 194 (identifying studies that suggest the frontal lobe of the brain develops later in life).

198. Linda Patia Spear, *Neurobehavioral Changes in Adolescence*, 9 CURRENT DIRECTIONS PSYCHOL. SCI. 111, 112–13 (2000).

199. Paus et al., *supra* note 173, at 261.

200. CYNTHIA LIGHTFOOT ET AL., THE DEVELOPMENT OF CHILDREN 393 (6th ed., 2009); Interview by *PBS Frontline* with Paul Thompson, Assistant Professor of Neurology, UCLA's Lab of Neuro-Imaging & Brain Mapping Division, *Inside the Teenage Brain*: *How Much Do We Know About the Brain,* PBSFRONTLINE.ORG, http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/how.html (last visited Nov. 6, 2011).

201. *See* Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. OF ADOLESCENT HEALTH 216, 216–21 (2009) (noting that connections between the amygdala and frontal lobe cortices integrate cognitive and emotional process, which results in emotional maturity or "the ability to regulate and to interpret emotions"); *Adolescent Brain Development: Understanding the Parts of the Brain,* JUVENILE DEFENSE NETWORK 1 (Youth Advocacy Project, Roxbury, Mass.) (N.D.) (developing adolescents tend to use their amygdala when responding to other people's emotions, yielding more reactionary, less reasoned perceptions of situations than adults).

202. Paus et al., *supra* note 173, at 258.

203. Spinks, *supra* note 26.

by allowing the brain to "transfer information between different regions efficiently."[204]

Because "[b]ehavior depends on the formation of appropriate interconnections among neurons in the brain,"[205] these findings suggest that the developmental functions associated with these parts of the brain are permanently affected during adolescence. Environmental factors also have a direct influence on brain development, affecting which neuronal pathways in the brain will be retained and which will be lost as a result of pruning.[206] Essentially, the brain is being hardwired during adolescence. "If a teen is doing music or sports or academics, those are the cells and connections that will be hardwired. If they're lying on the couch or playing video games or [watching] MTV, those are the cells and connections that are going to survive."[207] Likewise, if a teenager is routinely exposed to invasive search and seizure policies or they are forced into a defensive posture toward authority due to adversarial relationships with teachers, school officials, or SROs, which connections are strengthened and which wither away?

iii. The Future

Of course, the applicability of this research to search and seizure has certain limitations. There are no studies that specifically link invasive search and seizure policies to particular behavior patterns or developmental outcomes.[208] Scholars have confronted this issue in the context of juvenile justice reform, warning against overstating conclusions or relying too much on the current research in formulating policy.[209] Certainly,

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204. Johnson et al., *supra* note 201, at 217.

205. PRINCIPLES OF NEURAL SCIENCE 742–44 (Eric R. Kandel et al., eds., Elsevier Science & Tech. 2d ed. 1985) (1981).

206. Saunders, *supra* note 189 (describing research by Peter R. Huttenlocher that supported the theory that one's environment influences one's brain formation). "[Professor Huttenlocher] also suggested synapse loss is determined by use or nonuse. Unused or nonfunctioning synapses degenerate, a theory that allows for an environmental impact, as interactions with surroundings either fire or fail to fire particular synapses." *Id.*

207. *Inside the Teenage Brain*, PBSFRONTLINE.ORG, http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html (last visited Nov. 6, 2011).

208. E-mail from Richard Lerner, Dir., Institute for Applied Research in Youth Development, Tufts University, to Sarah Jane Foreman (July 29, 2010) (on file with the author).

209. *See* Jay D. Aronson, *Neuroscience and Juvenile Justice*, 42 AKRON L. REV. 917, 929 (2009) ("[W]e must not submit to a new kind of biological determinism which posits that behavior is merely the 'calculable [consequence] of an immense assembly of neurons firing.'") (quoting Dean Mobbs et al., *Law, Responsibility and the Brain*, 5 PLOS BIOLOGY 693, 693 (2007)); Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 515 (2009) (stating that even a "sophisticated understanding of child development does not, in itself, answer any legal questions"); Ma-

more research needs to be done before anyone can state conclusively that a low standard of suspicion and increased police presence during school searches leads to negative developmental outcomes. However, this does not negate the existing studies' relevance and usefulness as a framework within which school search and seizure can be analyzed.

For example, as discussed above, the research shows that adolescents are extremely susceptible to outside influences. Further, this susceptibility has rather straightforward implications in the context of search and seizure. Part of adolescent susceptibility is a tendency to overestimate adult authority.[210] This tendency renders them vulnerable to government overreaching in the context of school searches, particularly when the government actors are not "bounded in any meaningful way by recognizable principles of the Fourth Amendment which were developed to apply to adults."[211]

Therefore, additional research should be conducted in the hope that, over time, a better understanding can be gained of the specific ways in which the pedagogy of punishment, including aggressive search and seizure policies, affects adolescent development. In the meantime, it is fair to say that while there is much we do not know, there is much that we do know. The brain development studies discussed above are rich with information that can be used in the context of school searches. Moreover, research on bullying, harassment, and child maltreatment, demonstrates positive links between the treatment of adolescents and developmental outcomes. This research is instructive because some parallels can be drawn between the non-accidental physical and emotional harm characteristic of bullying, harassment, and maltreatment and the routine subjugation of young people to arbitrary searches that can, and often do, lead to harsh disciplinary consequences. In addition, bullying, harassment, and maltreatment all involve an imbalance of power between the perpetrator and the victim, just as search and seizure involves an imbalance of power between the actor and the subject.

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roney, *supra* note 168, at 170 ("[A]dolescent brain science never should be the primary argument for juvenile justice reform.").

210. Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Brain Development Capacities with the Legal Rights Provided by* In Re Gault, 60 RUTGERS L. REV. 125, 157, 164–65 (2007) (describing the tendency of adolescents to think their legal rights can be granted and taken away at the arbitrary discretion of adults). "Children are dependent on adults and look to them for assistance and approval. Yet, they overestimate adults' power, and therefore may be especially deferential and compliant with requests, commands, and suggestions from teachers, clergy, police, judges, and other authority figures." *Id*. at 157.

211. John C. Coleman, *Friendship and the Peer Group in Adolescence*, *in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 408, 425–28 (Joseph Adelson ed., 1980); Guggenheim, *supra* note 171, at 49.

While a thorough review of the bullying, harassment, and maltreatment literature is beyond the scope of this Article, some of the findings are particularly revealing and provide a potential roadmap for future research involving school search and seizure. Bullying and harassment are closely related and are often used interchangeably in the literature because both involve forms of peer aggression that result in victimization. Bullying has been defined as both repeated exposure "to negative actions on the part of one or more other students" and "a systematic abuse of power."[212] There is a great deal of research on bullying and peer victimization.[213] Most of the studies are in agreement that victimization is a cause of psychosocial distress.[214] Studies have shown that adolescents that were bullied had lower self-esteem, lower grades, greater dislike of school, and increased rates of absenteeism and violent behavior compared to those who were not bullied.[215]

Similarly, in the area of child maltreatment, which is usually defined as abuse or neglect by family, or caretakers, studies suggest that "experiences of abuse, neglect, and other types of trauma may affect the development of brain systems that regulate responsiveness to stress in ways that may be maladaptive in terms of mental health."[216] This is because the brain changes in response to environmental stimuli such as trauma and stress.[217] For example, "[h]igh levels of stress hormones can interfere with the [process of] myelination," which as discussed earlier, plays a critical role in the brain's ability to efficiently "conduct[ ] nerve impulses be-

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212. Kathleen Stassen Berger, *Update on Bullying at School: Science Forgotten*, 27 DEVELOPMENTAL REVIEW 90, 94 (2007).

213. *See e.g.,* Jen Jen Chang et al., *The Role of Repeat Victimization in Adolescent Delinquent Behaviors and Recidivism*, 32 J. ADOLESCENT HEALTH 272 (2003) (studying the effects on offending behaviors of youth after repeat victimization); David Perry et al., *Victims of Peer Aggression*, 24 DEVELOPMENTAL PSYCHOLOGY 807 (1988) (studying the degree to which certain children are victimized by peers).

214. David Hawker & Michael Boulton, *Twenty Years' Research on Peer Victimization and Psychosocial Maladjustment: A Meta-analytic Review of Cross-sectional Studies*, 41 J. CHILD PSYCHOLOGY AND PSYCHIATRY 441, 451 (2000). "This paper presented the first meta-analysis of the victimization-adjustment literature. The pattern of results across cross-sectional studies strongly suggested that victims of peer aggression experience more negative affect, and negative thoughts about themselves, than other children." *Id*.

215. *See* Tonja R. Nansel et al., *Relationships Between Bullying and Violence Among U.S. Youth*, 157 ARCHIVES OF PEDIATRICS & ADOLESCENT MEDICINE 348, 348, 353 (2003) (highlighting the correlation between bullying and weapon carrying and violent behavior).

216. Sandra Twardoze & John Lutzker, *Child Maltreatment and the Developing Brain: A Review of Neuroscience Perspectives*, 15 AGGRESSION AND VIOLENT BEHAVIOR 59, 62 (2010).

217. *Id.* (citing Bruce D. Perry et al., *The Neurobiology of Adaptation, and "Use-Dependent" Development of the Brain: How "States" Become "Traits,"* 16 INFANT MENTAL HEALTH J. 271 (1995)).

tween the two hemispheres of the brain."[218] In particular, adolescent maltreatment has been found to have a "pervasive influence" affecting later negative outcomes, which include: substance abuse, suicidal thoughts, anti-social behavior, criminal behavior, and health-risking sexual behaviors.[219]

The findings of these studies suggest several areas for future research, including further exploration of the causal relationship between invasive search and seizure practices and negative developmental outcomes. Depending on the age, family situation, and previous socialization of the student, current search and seizure practices could be stressful or traumatic experiences which, like bullying, harassment, and maltreatment, could affect brain development and lead to psychosocial distress.

However, even in the absence of further studies, the prevailing research has the potential to inform school search policy. The Supreme, Court's use of brain development science in the context of juveniles' Eighth Amendment rights has implications for juveniles' Fourth Amendment rights as well. By understanding how the Court used the science in *Roper v. Simmons* and *Graham v. Florida*, we can begin to conceptualize how a new, developmentally appropriate Fourth Amendment framework can emerge to protect students' rights. For example, although Justice Sotomayor found "citation to social science and cognitive science authorities . . . unnecessary to establish [the] commonsense propositions" set forth in *J.D.B.*, she still recognized that "the literature confirms what experience bears out" and cites to a section of *Graham* that discusses adolescent brain development.[220]

B. *The Cases*

i. *Simmons*

When *Roper v. Simmons* was decided by the Court in 2005, many of the longitudinal studies utilizing functional magnetic resonance imaging (fMRI scans) to study adolescent brain development were relatively new, although there was a growing body of scholarly literature that centered around the implications of this research for juvenile law and the death penalty in particular.[221] The research supported what juvenile advocates

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218. *Id.* at 64–65.

219. Carolyn A. Smith et al., *Adolescent Maltreatment and its Impact on Young Adult Antisocial Behavior*, 29 CHILD ABUSE & NEGLECT 1099, 1100 (2005); Terence P. Thornberry et al, *The Causal Impact of Childhood-Limited Maltreatment and Adolescent Maltreatment on Early Adult Adjustment*, 46 J. ADOLESCENT HEALTH 359, 364 (2010).

220. J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394, 2403–04 n.5 (2011).

221. Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity and Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741,

had argued for years: adolescents "are more vulnerable, more impulsive, and less self-disciplined than adults."[222] The *Simmons* Court found that juveniles lacked maturity and "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[223] Juveniles also embody characteristics that are "more transitory" and "less fixed" than adults.[224] The Court drew on its previous decision in *Atkins v. Virginia*,[225] which held that the execution of the mentally retarded violated the Eight Amendment. In *Atkins* the Court reasoned that deficiencies in reasoning and judgment among the mentally retarded "undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards."[226] In likening juveniles to the mentally retarded, the Court acknowledged that the profound differences in the adolescent brain establish the diminished capacity of juveniles thus excluding them from the category of worst offenders for which the death penalty is reserved.[227] In *Simmons*, age is the defining factor that renders the practice of juvenile executions constitutionally unsound.[228]

Citing to multiple amicus briefs that use neuroscience and developmental psychology to explain why adolescents are uniquely situated, the Court uses science to explain why age is important to their analysis.[229] The *Simmons* amici specifically reference the brain development studies discussed above. The American Medical Association joined by six other organizations as amici explain that "[c]utting-edge brain imaging technology reveals that regions of the adolescent brain do not reach a fully mature state until after the age of [eighteen]."[230] The American Psychological Association's brief specifies: "Recent research suggests a biological dimension to adolescent behavioral immaturity: the human brain does not settle into its mature, adult form until after the adolescent

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741–42 (2000); Scott & Steinberg, *supra* note 75, at 830; Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1016 (2003).

222. Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982).

223. Roper v. Simmons, 543 U.S. 551, 569 (2005).

224. *Id.* at 569–70.

225. 536 U.S. 304 (2002).

226. Atkins v. Virginia, 536 U.S. 304, 317 (2002).

227. *Simmons*, 543 U.S. at 570–71.

228. *Id.*

229. Brief of the Am. Medical Ass'n et al. as Amici Curiae in Support of Respondent, *Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1633549. Sixteen amicus briefs were filed with the Court in support of the respondent Christopher Simmons. Eight of those briefs reference adolescent brain development.

230. *Id.* at 2.

years have passed and a person has entered young adulthood."[231] Likewise, in their brief the Coalition for Juvenile Justice states that "recent neurological studies show that during adolescence, the brain undergoes a period of massive reorganization . . . [t]he most critical part of the brain develops [ninty-five] percent of its capacity."[232] The ABA reiterates: "[R]ecent scientific research supports the conclusion that the brains of juveniles are less developed than those of non-mentally retarded adults."[233] Similarly, the amicus briefs of the National Legal Aid and Defender Association, the Conference of Catholic Bishop and Other Religious Organizations, Missouri Ban on Youth Executions, and the Juvenile Law Center (in conjunction with fifty-one other organizations) all reference brain development as a serious issue for the Court to consider.[234]

Of all the amici, the American Medical Association and the American Psychological Association briefs (the science briefs) provide the most thorough review of adolescent brain development research. The American Psychological Association began their argument by alluding to "behavioral studies and recent neurological research."[235] The American Medical Association simply refers to "science."[236] The briefs then go on

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231. Brief for the Am. Psychological Ass'n & the Mo. Psychological Ass'n as Amici Curiae Supporting Respondent at 9, *Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1636447, at *9.

232. Brief of the Coal. for Juvenile Justice as Amicus Curiae in Support of Respondent at 9, *Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1629522, at *9.

233. Brief Amicus Curiae of the Am. Bar Ass'n in Support of the Respondent at 10, *Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1617399, *10.

234. *See* Brief of the Nat'l Legal Aid and Defender Ass'n as Amicus Curiae in Support of Respondent at 2–3, *Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1633550, at *2–3 (asserting that children under eighteen should not be put to death because they are inherently different from adults, not only scientifically, but under the rules of society as well); Brief Amici Curiae of the United States Conference of Catholic Bishops and Other Religious Organizations in Support of Respondent at 1–2, *Simmons*, 543 U.S. 551 (No. 03-633), 2004 WL 1617400, at *2–3 ("There a majority of this Court made clear that the views of religious organizations are '[a]dditional evidence' of a broad social and professional consensus against the imposition of the death penalty for a particular class of persons"); Brief of the Coal. For Juvenile Justice as Amicus Curiae in Support of Respondent, *supra* note 232, at 8–11 (arguing that youth and adults have different physical and mental capacities).

235. *See* Brief of the Am. Med. Ass'n et al. as Amici Curiae in Support of Respondent, *supra* note 229, at 5–9 (stressing that a number of regions of an adolescents brain do not finish fully developing until around age eighteen, particularly the regions dealing with behaviors that are commonly associated with criminal behaviors, such as impulse control); Brief for the Am. Psychological Ass'n & the Mo. Psychological Ass'n as Amici Curiae Supporting Respondent, *supra* note 231, at 3 (stressing that it is common for an adolescent to make errors in judgment "in earlier stages of the criminal process").

236. Brief of the Am. Med. Ass'n et al. as Amici Curiae in Support of Respondent, *supra* note 229, at 1.

to explain the research and the link between brain immaturity and adolescent behavior: "[P]sychological immaturity may affect a young person's decisions, attitudes, and behavior in the role of defendant in ways that may be quite important to how they make choices, interact with police, relate to their attorneys, and respond to the trial context."[237] One section of the brief was entitled: "Brain studies establish an anatomical basis for adolescent behavior."[238]

During oral argument, a majority of the questions posed to Simmons' attorney related to the scientific evidence documented in those briefs.[239] Justice Kennedy, the author of the majority opinion, specifically asked for comments on the scientific evidence presented in the science briefs.[240] It is not surprising then that "[t]he science brief figured prominently in the panoply of arguments available to Justice Kennedy when writing the Court's opinion."[241] The opinion heavily quotes the evidence presented in the science briefs, which states: "[T]he scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth . . . .'"[242] The *Simmons* Court was able to utilize the science because, according to the majority, the Eighth Amendment embodies "evolving standards" of decency that can accommodate new understandings of adolescent development provided by the scientific research.[243] While *Simmons* was a turning point for juvenile rights, the relevance of the Court's endorsement of adolescent brain development research to other aspects of juve-

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237. Brief for the Am. Psychological Ass'n & the Mo. Psychological Ass'n as Amici Curiae Supporting Respondent, *supra* note 231, at 30.

238. *Id.* at 9.

239. Transcript of Oral Argument at 21–38, *Simmons*, 543 U.S. 551 (No. 03-633), 2004 U.S. Trans. LEXIS 55 (questioning whether the data indicates that adolescents are still mentally developing or whether it simply indicates that their personalities will change while serving long sentences, a fact common to adult prisoners as well). A number of justices also suggested that the scientific data presented in the briefs ought to have been introduced in some way at trial in order to give the jury an opportunity to consider the scientific facts alleged by the briefs. *Id.* at 31–34.

240. *Id.* (asking for the attorney's comment on why the American Psychological Association would say that adolescents were capable of making a rational decision regarding abortions, but suggest in this case that juveniles should not be considered mentally mature enough to face the death penalty). Simmons' attorney argued the APA had not submitted inconsistent viewpoints; rather, in the matter of abortions, the issue was competency to make certain decisions, whereas here the issue is a lack of extreme moral culpability necessary to sentence someone to death. *Id.* at 27–28. The mentally retarded are permitted to determine whether or not to have an abortion, but the Court has held that they cannot be put to death. *Id.* at 27.

241. Aliya Haider, Roper v. Simmons*: The Role of the Science Brief*, 3 OHIO ST. J. CRIM. L. 369, 376 (2006).

242. Maroney*, supra* note 168, at 92–93.

243. *Simmons*, 543 U.S. at 560–61.

nile law, including other Eighth Amendment considerations, was unclear. Although scholarship abounded, many were skeptical of the decision's reach.[244]

ii. *Graham*

In 2009 the Court revisited the issue central to *Simmons*. In *Graham v. Florida*, the Court analyzed an Eighth Amendment issue involving the application of life without parole sentences to juvenile offenders; as in the *Simmons* case, *Graham* generated several amici briefs that discussed adolescent brain development.[245] The American Medical Association and the American Academy of Child and Adolescent Psychiatry filed a science brief in support of neither party that was nearly identical in substance to the American Medical Association brief filed in *Simmons*; likewise, the American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, and Mental Health America filed a brief in support of the juvenile petitioner that used the same brain development arguments that were successful in *Simmons*.[246] "Research in developmental psychology and neuroscience—including the research presented to the Court in *Simmons* and additional research conducted since *Simmons* was decided—confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified."[247] During the oral argument, Graham's attorney cited "science" as the reason "to draw the line at [eighteen]" with regard to life without parole sentences.[248] Again, the

244. Maroney, *supra* note 168, at 92–93.

245. *See, e.g.*, Brief for NAACP Legal Def. & Educ. Fund, Inc. et al. as Amici Curiae in Support of Petitioners at 3–6, Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2197340, at *3–6 (arguing that scientific evidence, prior rulings, and common experience all indicate that children are not as mentally developed as adults, and therefore should not be subject to harsh sentences such as life without parole).

246. *See generally* Brief for the Am. Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, *Graham*, 560 U.S. __, 130 S. Ct. 2011 (No. 08-7412), 2009 WL 2236778 (arguing that juveniles are far more susceptible to immature and irresponsible behavior then their adult counterparts, and although their crimes should not be excused, courts should not impose sentences that permanently end their free lives).

247. *Id.* at 3.

248. Transcript of Oral Argument at 11–12, *Graham*, 560 U.S. __, 130 S. Ct. 2011 (No. 08-7412), 2009 WL 3731318, at *11–12. In answering questions from Chief Justice Roberts, Mr. Gowdy stated the following:

> *Roper* [v. *Simmons*] states, and the science — States that base it on the science, that at that age we cannot make a determination about whether or not the adolescent will or will not reform. . . . [T]he Court in *Roper* [v. *Simmons*] struggled with where to draw the line between maturity and immaturity and it concluded, rightly so, to draw the line at 18 based on both the science and the legislative determinations.

Id. at 11.

scientific arguments that had provided a basis for *Simmons* persuaded the Court that the particular vulnerabilities of adolescence warranted greater protection under the Eighth Amendment. "No recent data provide[s] reason to reconsider the Court's observations in *Roper* [*v. Simmons*] about the nature of juveniles. As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[249] The Court cites *Simmons* heavily and makes similar arguments about the mutable character of juveniles.[250] "[J]uveniles . . . 'are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure'; and their characters are 'not as well formed.'"[251] The Court held that sentencing a juvenile to life without the possibility of parole for a non-homicidal offense is a violation of the Eighth Amendment.[252] Again, the Court recognizes that "'evolving standards of decency'" guide the decision.[253]

Graham strengthens *Simmons* and advances the rights of adolescents by emphasizing that, based on brain developments, it is difficult to determine whether an adolescent is a threat to society or simply irresponsible.[254] Some of the concerns with *Simmons* were that it had limited applicability to other areas of law because "[d]eath is different."[255] If there is uncertainty about the developmental status of adolescents, it seems reasonable to shield them from one of the most extreme and final punishments our judicial system can impose. *Graham* moves the discussion of adolescent development beyond the death penalty.[256] The importation of *Simmons* discussion on adolescent brain development into *Graham's* holding may also signify the Court's willingness to consider the applicability of this research to other doctrines. As Justice Roberts asserts in his concurrence, "*Roper* [*v. Simmons'*] conclusion that juveniles are typically less culpable than adults has pertinence beyond capital

249. *Graham*, 560 U.S. at __, 130 S. Ct. at 2026.

250. *Id.* (indicating that juveniles are more capable of change than adults).

251. *Id.* at 2026 (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

252. *Id.* at 2030.

253. *Id.* at 2021 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

254. *See* Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2026 (2010) (stressing that there is no recent data that would make the Court reconsider their analysis on brain development since *Simmons*).

255. *Id.* at 2046. "[T]he death penalty is different from other punishments in kind rather than degree." Solem v. Helm, 463 U.S. 277, 294 (1983). Prior to the *Graham* decision, some commentators did not believe the Court would find the scientific evidence persuasive in a case of life without parole. *See, e.g.*, Maroney, *supra* note 168, at 120–22 (commenting that the framework of brain science applied in *Simmons* would not be successful in other non-homicidal cases).

256. *Graham*, 560 U.S. at __, 130 S. Ct. at 2034 (holding that the Constitution prohibits the "imposition of a life without parole" for a non-homicidal offense in a juvenile case).

cases."[257] The pertinence of the Fourth Amendment in *Graham* is not necessarily in the holding itself, but it is inferred from the Court's analysis. The science not only suggests that adolescents are less culpable than adults, but that they have "a heightened susceptibility to negative influences and outside pressures" and their character is "'more transitory' and 'less fixed' than that of an adult."[258] Negative environmental pressures may create patterns of behavior that under the "use it or lose it" principle described by Dr. Giedd, become fixed over time as the adolescent matures into adulthood.[259]

The Supreme Court's recognition and use of adolescent brain development studies in *Simmons* and *Graham* is encouraging, particularly because the application of brain development has been controversial when resolving constitutional questions. The Court faced sharp criticism when it cited to social science research in footnote eleven of *Brown v. Board of Education*.[260] Scholars and Justices continue to debate the proper place of science in constitutional interpretation.[261] For many critics "the problem is not that the social sciences are insufficiently scientific. The prob-

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257. *Id.* at 2039 (Roberts, J., concurring).

258. *Id*. at 2038.

259. *Inside the Teenage Brain*, *supra* note 207.

260. 347 U.S. 483, 494 (1954). In *Brown*, footnote eleven is written as follows:

> K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), c. VI; Deutscher and Chein, The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J.Psychol. 259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, ed., 1949), 44–48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944).

Id. at 494 n.11. For a critique of *Brown's* reliance of social science, see Charles L. Black Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 428 (1960); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157–58 (1955) (commenting that there is a "danger" in following the Court's adherence to social science in *Brown* and *Bolling*); Ronald Dworkin, *Social Sciences and Constitutional Rights – the Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 6 (1977) (stating that dependence on social science is not encouraged for constitutional cases).

261. *See* David M. O'Brien, *Of Judicial Myths, Motivations and Justifications: A Postscript on Social Science and the Law*, 64 JUDICATURE 285, 288–89 (1981) (discussing that it is problematic for the Court to consider social science in analyzing a constitutional issue). *See also* Eisenstadt v. Baird, 405 U.S. 438, 470 (1972) (Burger, J., dissenting) ("The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion."); William E. Doyle, *Can Social Justice Data Be Used in Judicial Decisionmaking?*, 6 J.L. & EDUC. 13, 18 (1977) (stating, "courts do not take social science facts as the touchstone of constitutional interpretation because such data is [objective] rather than substantive in nature").

lem is that they are *too scientific* for the normative task at hand."[262] As a result of the social science debate, courts tend to ignore psychology and other social sciences in favor of a common sense approach.[263] However, common sense alone offers only limited insight into psychological, emotional, or social development. Moreover, as it relates to children, common sense can often become a proxy for paternalism justifying state infringement into their fundamental rights.[264] *Simmons* and *Graham* raise the possibility that the current Supreme Court may be willing to move away from traditional notions about the place of children in the constitutional polity and consider developmental research when defining the constitutional rights of adolescents.

The question then becomes, how does the science, which was so influential in *Simmons* and *Graham*, impact a constitutional inquiry into

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262. Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 432, 449 (2006).

263. *See* Robert E. Shepherd Jr., *A Developmental Perspective on the Adjudication of Youthful Offenders: Comments on Steinberg and Cauffman's "The Elephant in the Courtroom,"* 6 VA. J. SOC. POL'Y & L. 429, 430 (1999) (suggesting that lawyers, policy makers, and psychologists must begin to communicate in concrete terms). He continues by discussing how:

> Almost twenty years ago, Dr. Arlene Skolnick pointed out that there are[ ] three stances taken by policymakers, lawyers, and judges toward psychology (and the other social sciences): (1) they ignore it, by far the most common approach; (2) they rely on it for expert advice, assuming that research findings contain clear policy mandates waiting to be put into effect; or (3) they tend to be manipulative in using it—the expert is called in to put the stamp of science on what is basically a value judgment.

Id. Dr. Skolnick also "proposed 'a fourth alternative, namely, that legal and policy decisions concerning children should be informed by developmental research, even though such decisions cannot be determined by psychological considerations alone.'" *Id.* at 431.

264. *See* Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 (1975) (holding that the city's ordinance was unconstitutional even though one of its purposes was to protect children from viewing sexually explicit movies). "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults." *Id.* at 212. *See also* Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result) (arguing that a minor may, "in some precisely delineated areas," lack capacity to exercise rights). Some scholars argue that the rights of youth are restricted simply because they are young. *See* Leon Letwin, *Perspectives on the Post-Civil War Amendments, After* Goss v. Lopez*: Student Status as Suspect Classification?*, 29 STAN. L. REV. 627, 627 (1977) (stressing that past Court decisions have regarded young people as "unentitled to independent rights"). *See also* Laurence H. Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, 39 LAW & CONTEMP. PROBS. 8, 11 (1975) (noting that age alone should not suffice to take a fundamental right away from a young person); Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 266 (1979) (explaining that there is not an explanation by courts or by legislatures as to why only some rights, and not all rights, are granted to children). For a review of the paternalistic views of Hobbes, Locke, and Mill, see Victor L. Worsfold, *A Philosophical Justification for Children's Rights*, 44 HARV. EDUC. REV. 29, 29 (1974).

Fourth Amendment reasonableness? If the recent *J.D.B.* case is to serve as a model, perhaps the Court will utilize the science only tangentially, as underlying support for a common-sense approach to the normative inquiry.[265] *J.D.B*. is significant because it specifically makes the age of the suspect a critical part of the constitutional inquiry,[266] which is what I propose in the Fourth Amendment context. *J.D.B.'s* common sense approach focuses on expanding, rather than contracting, the rights of adolescents.[267] This is not the paternal common sense of the past, but a common sense supported by multidisciplinary research. Perhaps this is part of the legacy of *Simmons* and *Graham* that is most accessible to other areas of the law—reclaiming common sense from the realm of unverified folk tales and bringing it into the twenty-first century.

The Court's acknowledgement in *Simmons*, *Graham*, and *J.D.B.* that adolescents "are more vulnerable or susceptible to . . . outside pressures"[268] has relevance to the Fourth Amendment analysis of school searches. "[A]lthough the necessities for a public school search may be greater than for one outside the school, the psychological damage that would be risked on sensitive children by random search[es] insufficiently justified by the necessities is not tolerable."[269] Moreover, the public school setting is an important forum for the democratic socialization of young people.[270] Thus, in light of adolescents' unformed characters,

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265. *See* J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394, 2403 (2011) (highlighting that, unlike adults, children will react differently to a police interrogation). As mentioned earlier, the Court does cite to *Graham's* recognition and endorsement of developments in psychology and brain science since *Simmons*. *Id.* In addition, the Petitioner and all of the amici filing briefs in support of the Petitioner cite to the developmental science. Reply Brief for Petitioner at 5, *J.D.B*., 654 U.S. __, 131 S. Ct. 2394 (No. 09-11121), 2011 WL 882588, at *5; Brief of Center on Wrongful Convictions of Youth, et al., as Amici Curiae in Support of Petitioner at 21–22, *J.D.B*., 654 U.S. __, 131 S. Ct. 2394 (No. 09-11121), 2010 WL 5385329, at *21–22; Brief of the Am. Bar Ass'n as Amicus Curiae in Support of Petitioner at 10–12, *J.D.B.*, 654 U.S. __, 131 S. Ct. 2394 (No. 09-11121), 2010 WL 5385326, at *10–12; Brief of Juvenile Law Ctr. et al., as Amici Curiae in Support of Petitioner at 11–14, *J.D.B*., 654 U.S. __,131 S. Ct. 2394 (No. 09-11121), 2010 WL 5535752, at *11–14; *see also* Brief of the Nat'l Ass'n of Criminal Def. Lawyers as Amicus Curiae in Support of Petitioner at 15, *J.D.B*., 654 U.S. __, 131 S. Ct. 2394 (No. 09-11121), 2010 WL 5385327, at *15 (mentioning that young children react different to police interrogations than adults).

266. *J.D.B*., 564 U.S. at __, 131 S. Ct. at 2398–99.

267. *See id.* at 2403 (holding that a reasonable child will feel pressured to police interrogation).

268. Graham v. Florida, 560 U.S. __, 30 S. Ct. 2011, 2026 (2010) (citing Roper v. Simons, 543 U.S. 551, 569–70 (2005)); *J.D.B*., 560 U.S. at __, 131 S. Ct. at 2397 (citing Roper v. Simons, 543 U.S. 551, 569 (2005)).

269. People v. Scott D., 315 N.E.2d 466, 471 (N.Y. 1974).

270. *See* KENNETH DAUTRICH ET AL., THE FUTURE OF THE FIRST AMENDMENT: THE DIGITAL MEDIA, CIVIC EDUCATION, AND FREE EXPRESSION RIGHTS IN AMERICA'S HIGH

"compelling authorities to justify their use of power in terms of applicable legal standards may not be so bad after all" because it will instill a sense of personhood in the constitutional sense, which is a key component of democratic citizenship.[271]

IV. From Science To Substance

"Children should be educated and instructed in the principles of freedom."
John Adams, *Defense of the Constitutions*, 1787

The reasonable suspicion standard for school searches is amorphous and flexible; therefore, it places very little limitation on government action. As we have seen, only when a student is subjected to complete humiliation is the searching school official's authority called into question.[272] Many legal scholars agree that the standard of reasonable suspicion in school searches needs to be reconsidered.[273] Some argue that reasonable suspicion is constitutionally problematic because the lack of a clear individualized suspicion requirement further eviscerates the already low threshold of "reasonableness".[274] Furthermore, as Michael Pinard points out, the "increased interdependency between law enforcement authorities and public school officials . . . create a disconnection between rights and ramifications" when the standard for school searches is reasonable suspicion.[275] As discussed in Part II of this Article, the influx of police into public school in conjunction with the reasonable suspicion standard creates opportunities and incentives for abuse because it

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Schools 27 (2008) (recognizing that "schools can directly influence students' minds and outlooks and thus infuse values directly into their views on society, government and laws.").

271. Letwin, *supra* note 264, at 652.

272. *See* Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2641 (2009) (finding that a school official's strip search of a student "down to her underwear" constituted an unreasonable search given the circumstances).

273. *See* Gardner, *supra* note 73, at 897–98 ("urg[ing] the judiciary to require a finding of individualized suspicion as a prerequisite to valid searches and seizures"); Josh Kagan, Reappraising *T.L.O.*'s "Special Needs" Doctrine in an Era of School-Law Enforcement Entanglement, 33 J.L. & Educ. 291, 291 (2004) (questioning the continued applicability of *T.L.O.* given that schools and law enforcement have become "increasingly entangled" in recent years); Matthew Lynch, *Mere Platitudes: The "Domino Effect" of School Search Cases on the Fourth Amendment Rights of Every American*, 91 Iowa L. Rev. 781, 785 (2006) (discussing a "domino effect" of falling Fourth Amendment rights beginning with the government's infringement of students' rights in schools); Pinard, *supra* not 127, 1070 (recommending that a more protective probable cause standard govern student searches when law enforcement has a presence in the school).

274. Gardner, *supra* note 73, at 937–38.

275. Pinard, *supra* note 127, at 1069, 1124.

blurs the line between school officials and law enforcement officers.[276] Others have observed that it denigrates American values by creating a slippery slope down which other cherished ideals are slowly sliding.[277]

Furthermore, reasonable suspicion is not a developmentally appropriate standard. A school environment, where youth are criminalized and denied basic privacy rights, is detrimental to positive youth development.[278] "A system predicated on hostility to student rights runs the risk not only of forfeiting this educational opportunity but of exacerbating the very difficulties it is seeking to cure."[279] The malleability of the adolescent brain "suggest[s] that adolescence may provide a sort of 'second chance' to refine behavior control."[280] Under this view, even troubled teenagers have the capacity to develop into productive young citizens. Because adolescents spend a significant amount of time in school, the school environment plays a large role in their development.[281] By making democratic socialization as part of the school environment, it can be instrumental in providing positive influences to a student's developmental process. Conversely, a student's future potential can become limited when exposed to negative environmental influences become entrenched as nerve connections in the brain responsible for those behaviours are strengthened by repeated use.[282]

The need for safe schools and the danger posed by even a single violent actor with a gun is great.[283] Therefore, when it comes to preventing vio-

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276. *Id.* at 1071–74. "These different standards encourage law enforcement officers to persuade school officials to conduct searches on their behalf when the level of suspicion does not rise to probable cause, relying on the lower reasonableness standard as a bootstrap." *Id.* at 1092.

277. Lynch, *supra* note 273, 789–91.

278. Letwin, *supra* note 264, at 649.

279. *Id.*

280. Gargi Taludker, *Decision-Making is Still a Work in Progress for Teenagers*, BRAIN CONNECTION (July 2000), http://brainconnection.positscience.com/topics/?main=news-in-rev/teen-frontal.

281. *See* Albert D. Farrell et. al., *Peer and School Problems in the Lives of Urban Adolescents: Frequency, Difficulty and Relation to Adjustment*, 44 J. SCH. PSYCHOLOGY 169, 170 (2006) (discussing the importance of the school setting as an important context for the social development of youths).

282. *Inside the Teenage Brain*, *supra* note 207.

283. *E.g.*, *Teen Kills Himself and Another, too*, DETROIT FREE PRESS, Jan. 6, 2011, *available* at 2011 WLNR 299813; Lee Roop, *Fatal School Shooting Tied to Fledgling Gang Activity*, HUNTSVILLE TIMES, Feb. 10, 2010, *available at* 2010 WL 28819896; Cara DiPasquale & Alberto Trevino*, Student Kills 1, Injures 2 in High School Shooting*, CHIC. TRIB., Nov. 9, 2005, *available* at 2005 WLNR 23494199; P.J. Huffstutter & Stephanie Simon, *10 Dead After School Shooting: Boy Kills Grandparents, then Fires on Students and Staff on a Minnesota Indian Reservation*, L.A. TIMES, Mar. 22, 2005, *available at* http://articles.latimes.com/2005/mar/22/nation/na-shooting22; Lianne Hart, *School Shooting Kills Teen in New Orleans; Three Other Students were Injured by Stray Bullets. Four Teenage*

lence at school, the violent actor often serves as the example upon which policy is shaped. The Court's school search jurisprudence is no exception: in the balance between safety and privacy, safety takes precedence.[284] For many, the sacrifice of students' privacy rights is worth the gain in safety and security for all members of the school community. For others, the lack of privacy in school is symptomatic of a culture of disempowered citizenship and a general lack of agency vis-à-vis the state.[285] For these populations, the fear of school violence is valid, but so is the frustration and contempt towards a justice system that seems built on racial subordination.[286]

Therefore, in this context, in order for the balance between safety and privacy to be weighed adequately "the degree of community resentment aroused by particular practices" must be considered when assessing "the quality of the intrusion upon reasonable expectations of personal security caused by those practices."[287]

A school search framework that better accounts for the developmental needs of youth would appreciate that adolescents are future autonomous

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Suspects Arrested, ORLANDO SENTINEL, Apr. 15, 2003, *available at* http://articles.orlandosentinel.com/2003-04-15/news/0304150343_1_new-orleans-stray-bullets-assault-rifle; *Suspect Tells Investigators He Planned to Kill Himself; California School Shooting: Records Show He Counted Out 40 Bullets Before Class*, TELEGRAPH HERALD, Mar. 14, 2001, at A2; Scott Sunde & Steve Miletich, *Teen's Rage Turns Deadly, High School Shooting Kills 1, Wounds 23*, SEATTLE POST-INTELLIGENCER, May 22, 1998, *available* at 1998 WLNR 1955115. As compared to other violent crimes, school shootings are uncommon; however, they never fail to shock the conscience and for this reason they grab headlines whenever they happen. Todd Zwillich, *CDC: School Homicides Are Rare*, WEBMD (Jan. 17, 2008), http://www.webmd.com/parenting/news/20080117/cdc-school-homicides-are-rare.

284. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995) (finding that the high degree of government concern was met in justifying school searches in violation of an expectation of privacy); *see also* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (recognizing "that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures").

285. Paul J. Hirschfield & Katarzyna Celinska, *Beyond Fear: Sociological Perspectives on the Criminalization of School Discipline*, 5 SOC. COMPASS 1, 7–8 (2011).

286. ANDERSON, *supra* note 22, at 32–34 (describing that a code of the street has developed as a set of informal rules that dictates the acceptable interpersonal public behavior; this code of the street has emerged as a cultural adaptation because of the lack of trust in the judicial system, which seems to represent the White population). *See also* Amruta Ghanekar & Sara Taveras, *MIMIC: Tackling the Root Causes of Juvenile Delinquency*, PHILA. SOC. INNOVATIONS J., Feb. 2010, http://www.philasocialinnovations.org/site/index.php?option=COm_content&view=article&id=116%3Amimic-tackling-the-root-causes-of-juvenile-delinquency&catid=21%3Afeatured-social-innovations&Itemid=35&showall=1 (discussing a community based program organized by ex-offenders concerned with the high number of youth entering the juvenile justice system).

287. Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 365 (1998).

citizens in the process of developing a sense of personhood. A developmentally appropriate paradigm would encourage positive youth development and democratic socialization. To this end, the Fourth Amendment right to be free from unreasonable searches and seizures must be viewed as a vehicle through which adolescents' capacity to become "mature adults capable of democratic self-government" and self-realization—"the process by which an individual defines himself"—can be developed.[288] Such an approach would recognize that there is a coincidence of interest shared by students, school officials, and society in developing democratic citizens.

Below, the positive youth development and democratic socialization, which has both political and legal dimensions is discussed. Concepts of privacy, autonomy, and personhood are important to political socialization whereas legal socialization relates to perceptions of the law and legal authorities. Also below I introduce the "positive youth development approach" to school searches that incorporates into the reasonableness balance the convergent interest in a public education system that creates law-abiding, autonomous, right-holding citizens.

A. *The Positive Youth Development Approach*

Science suggests and the Court accepts the notion that negative environmental influences impact adolescent development in negative ways.[289] The logical contra positive is that positive environmental factors can encourage positive development in adolescents; this proposition has been adopted by youth advocates in many different disciplines and is referred to as "positive youth development" (PYD).[290] Instead of looking at "adolescent development through the lens of problems and defi-

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288. John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1771–73 (1981).

289. Brief for the Am. Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, *supra* note 246, at 15.

> Because of their developmental immaturity, adolescents are more susceptible than adults to the negative influences of their environment—and, indeed, their actions are shaped directly by family and peers in ways that adults' are not. "Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control."

Id.

290. Richard F. Catalano et al., *Positive Youth Development in the United States: Research Findings on Evaluations of Positive Youth Development Programs*, 591 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 101–02 (2004).

> Positive youth development programs are approaches that seek to achieve one or more of the following objectives: [bonding, resilience, social competence, emotional competence, cognitive competence, behavioral competence, moral competence, self-determination, spirituality, self-efficacy, clear and positive identity, belief in the future,

cits . . . positive youth development focuses on strengthening protection in youths' lives while simultaneously reducing risk. The notion is to move beyond simple risk avoidance . . . and capitalize on building resilience through competency development."[291]

This approach is utilized by entities ranging from state health departments, non-profit educational schools, and public defender offices to juvenile court programs. There is an emerging body of literature regarding the application of PYD to juvenile justice.[292] The positive youth development approach "gained significant traction beginning in the 1990s."[293] Around the same time, the research findings on adolescent brain development were being released; the science of adolescent brain development supports the key facets of the youth development approach "that children are different from adults, are capable of change, and need support and opportunities for healthy development."[294] Because of the extensive growth and development taking place in the teenage brain, adolescence provides an "opportunity to help youth become responsible adults" by laying "a foundation . . . that will help them make informed decisions."[295] This is exactly what the positive youth development approach aims to achieve. It focuses on the inherent strengths of young people, which include the potential for structural and functional change of the adolescent brain and the strengths that exist in their environment, often referred to as "ecological developmental assets."[296] This focus can help youth mature into successful adults.[297] As Dr. Giedd describes, the teenage brain is "not done being built."[298] Therefore, "if the strengths of youth are aligned across adolescence with ecological developmental assets, then

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recognition for positive behavior, opportunities for prosocial involvement, prosocial norms].

Id.

291. James M. Frabutt et al., *Envisioning a Juvenile Justice System that Supports Positive Youth Development*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 107, 108–09 (2008).

292. *Id.* at 107–08 (explaining that there are plenty of scholars, child advocates, and practitioners who promote an integrated system that will support and aid youths in becoming competent adults); JEFFREY A. BUTTS ET AL., CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHI., ISSUE BRIEF: FOCUSING JUVENILE JUSTICE ON POSITIVE YOUTH DEVELOPMENT 3–4 (2005) (describing the need for effective programs to address youth delinquency and explaining the factors needed to accomplish such programs).

293. Frabutt et al., *supra* note 291, at 108.

294. NAT'L JUVENILE JUSTICE NETWORK, USING ADOLESCENT BRAIN RESEARCH TO INFORM POLICY: A GUIDE FOR JUVENILE JUSTICE ADVOCATES (2008).

295. *Id.*

296. Richard M. Lerner et al., *Exploring the Foundations and Functions of Adolescent Thriving Within the 4-H Study of Positive Youth Development: A View of the Issues*, 30 J. APPLIED DEVELOPMENTAL PSYCHOL. 567, 567 (2009).

297. *Id.*

298. *Inside the Teenage Brain*, *supra* note 207.

every young person's development can be improved."[299] School is an example of one such ecological development asset. A student's experience of the school environment, and the types of resources provided to the student can cultivate adolescent change in a positive direction.

B. *The Democratic Socialization Function of Public Education*

The notion that public school is a primary mechanism for the socializing of America's youth is not new. Courts and scholars have long recognized the importance of public education in the formation of democratic citizens.[300] Although some scholars are critical of certain aspects of the socialization process, it is clear that socialization occurs in public school through curriculum and institutional practices.[301] Professor Betsy Levin posits:

> If the educational institution is wholly undemocratic, students are likely to get mixed signals with regard to the democratic values

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299. Lerner, *supra* note 296.

300. *See e.g.,* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) ("Public education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation" (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968))); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 864 (1982) (noting "that public schools are vitally important 'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system'" (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)); PAULA S. FASS, OUTSIDE IN: MINORITIES AND THE TRANSFORMATION OF AMERICAN EDUCATION 27 (1989) (describing progressive educational theorist John Dewey's notion that public school should be "instrument[s] of morality and citizenship," as well as "democratic and participatory"); Chiang-Le Heng et al., *Violence in Schools: Examining the Differential Impact of School Climate on Student's Coping Ability*, 19 EDU. & L. J. 95, 97 (2009) ("The school setting is one of the most significant socialization contexts in our culture and has a significant potential to affect a child's life course.").

301. *See* Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CALIF. L. REV. 967, 992–993 (2003) (describing how dominant groups use the socializing power of schools to maintain dominance); Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1649 (1986) ("Socialization to values through a uniform educational experience necessarily conflicts with freedom of choice and the diversity of a pluralistic society."). *See generally* Felice J. Levine & June Louin Tapp, *The Dialectic of Legal Socialization in Community and School*, *in* LAW JUSTICE AND THE INDIVIDUAL IN SOCIETY: PSYCHOLOGICAL AND LEGAL ISSUES 163, 179–182 (June Louin Tapp & Felice J. Levine eds., 1977).

> The school setting can have a significant impact on the legal socialization of youth. [The] focus on stimulating ethical use of the law during childhood is based on two assumptions—the primacy of the formative years in determining patterns of legal reasoning and the potency of initial socialization over resocialization.

Id. at 279.

> needed to function as citizens in our society: the way in which school administrators operate schools may have a more powerful influence on students than the lessons in their civics textbooks.[302]

As discussed in Part II above, students are learning powerful lessons from their interactions with school officials and school police. The harsh disciplinary practices of what I have described as a "ghetto education" socialize youth in ways that are antithetical to democratic citizenship. In order for public high schools to engage in citizen education, which necessarily includes democratic socialization, student privacy rights must be taken seriously. The way in which students experience rights, like institutional practices and textbook lessons, can contribute to democratic socialization.[303]

The socializing role of student Fourth Amendment rights is particularly important because individual privacy is a hallmark of democratic citizenship.[304] Privacy is also the overriding concern of the Fourth Amendment's protections against unreasonable search and seizure.[305] "Constitutional protection of privacy is tied closely to the more basic right to be afforded dignity and self-respect—in short, to be treated as a person."[306] Individual privacy is closely connected to individual autonomy, another important facet of citizenship, because negative privacy rights carve out a sphere of constitutionally protected space within which an individual can make autonomous decisions about one's life. However, because the right to engage in autonomous decision-making has traditionally been predicated on the capacity for mature, rational decision-making, children's privacy rights have been limited.[307]

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302. Levin, *supra* note 301.

303. *See* Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2125, 2143 (2011) (describing a "developmental theory of children's constitutional rights").

304. Stephen J. Schnably, *Beyond* Griswold*: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861, 871–72 (1991) (describing constitutional theories that connect the protection of privacy with a conception of democratic citizenship).

305. U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

306. Gardner, *supra* note 73, at 905.

307. Even cases granting children privacy rights curtail those rights in significant ways. *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979) (recognizing "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing"); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) ("The Court indeed,

Even assuming that a model of children's privacy rights that limits such rights due to immaturity and an undeveloped capacity for autonomous choice is justified as applied to younger children, adolescents present a challenge to this model because of their unique developmental situation. Unlike younger children, adolescents are developing the social skills that will carry them forward to successful adulthood; the requisite nerve connections that create the capacity for mature, rational decision-making are in the process of being formed.

Autonomy, privacy, sexuality, individuality, and personal achievement are areas that adolescents explore as they mature into adulthood.[308] As a result of this "growing need for independence," adolescents may embarrass easily and seek a greater sense of privacy in their personal lives.[309] For students, the school environment serves as the laboratory for this developing sense of privacy. According to Professor Gary Melton, "as children approach adolescence, privacy becomes important as a marker of independence and self-differentiation. Threats to the privacy of school-aged children may be reasonably hypothesized to be . . . threats to self-esteem."[310] This can have an even greater impact on student's in inner-city schools because school may be one of the more "private" environments they experience.[311] "The implication is that, as options for privacy decrease, spaces which suburban, middle-class people may regard as public may taken on meaning as 'private' places for inner-city, lower-class

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however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults."). *See also* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (finding the school's search of a student's purse to be reasonable).

> [T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.

Id.

308. Jennifer Drobac, *"Developing Capacity": Adolescent "Consent" at Work, at Law and in the Sciences of the Mind,* 10 U.C. DAVIS J. JUV. L & POL'Y 1, 27 (2006). The deprivation of autonomy is the hallmark of childhood. *Id.* "In turn, dominant norms relating to children include young, vulnerable, [W]hite, middle-class, two-parented, dependent, obedient, innocent, sexually inactive, English-speaking, unemployed, cared-for and not care-giving, irrational, unformed, and incapable of judgment . . . [t]he law promotes these norms and frowns upon or ignores such phenomena as . . . children's subjectivity, voice, and agency." Annette Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children,* 39 COLUM. HUM. RTS. L. REV. 573, 584 (2008).

309. Drobac, *supra* note 307 at 28 (explaining how teenagers "may not want to be seen with their parents," may lock their bedroom door, and may keep a journal or diary in order to develop a sense of autonomy).

310. Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?,* 62 NEB. L. REV. 455, 488 (1983).

311. Gardner, *supra* note 73, at 902. *s*ee Appell, *supra* note 308, at 582 (discussing the limiting force of location on the lives of children).

children. Consequently, expectations of privacy are likely to vary with social and physical environments."[312]

When youth are reconceived as people with "citizenship potential," rights take on a different role because the youth are now viewed as citizenry having a developing capacity for autonomy. Rather than entitlements that protect an existing capacity they serve to cultivate a capacity that is being created. If student's rights are recognized for their socializing role, schools can nurture adolescent's emerging sense of privacy and develop student's capacity for autonomous choice though fastidious application of students' Fourth Amendment rights.

> [T]hrough their daily experiences children and adolescents develop . . . . [A] sense of themselves as separate from and connected to others, an understanding of the conditions under which to seek physical and psychological aloneness or interaction, and understanding of the possible range of such experience, and the uses of each of these for self-enhancement or regrouping. At the same time, these experiences give children and adolescents a view of societal norms with respect to certain behaviors and activities and provide a way of interpreting these as valued or not valued, good or bad. In this way children's experiences with privacy feed back into their sense of self-esteem and help define the range, limits, and consequences of individual autonomy within our society.[313]

In fact, the Court has implicitly endorsed such a view in some of its First Amendment cases involving free speech in public schools.[314] In these cases, the Court is concerned with how restrictions on free speech and the free exchange of ideas will affect the citizenship potential of schoolchildren.

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312. Melton, *supra* note 310, at 490–91.

313. Gardner, *supra* note 73, at 901 (citation omitted).

314. *See* Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868 (1982) (holding that schools cannot remove books from the school library because of their content; "In sum, just as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members"). W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (holding that schools cannot compel students to recite the pledge of allegiance). "That they are educating the young for citizenship is [the] reason for scrupulous protection of Constitutional freedoms [for] the individual, if we are not to strangle the free mind at its source and teach youth to discount [the] important principles of our government as mere platitudes." *Id. See also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (holding that schools cannot prohibit students' peaceful expression of opinion; "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

Even assuming that adolescents' brain plasticity and developmental immaturity makes them poor decision makers, "mental disability need not obviate an adult's status as a person," and the same should be true for adolescents.[315] Rather, the fact that they are in a critical developmental phase, progressing ever closer toward adult personhood, is exactly why their fledging sense of autonomy should be respected and nurtured.[316] Affording them the full measure of privacy guaranteed by the Fourth Amendment is developmentally appropriate because it would actively encourage school officials and SRO's to "support [the] gradual passage towards adulthood . . . by granting [the student] the full rights of an adult when his interests are jeopardized by the state action."[317] Also, it would reduce the possibility for abuse by well-meaning, overzealous actors. *T.L.O.* and *Redding* both recognize that students have a right to privacy, albeit an abrogated one.[318] However, there is reason to believe that increased privacy rights for students would be psychologically and developmentally beneficial.[319]

Furthermore, adolescents' experience with privacy rights can impact their legal socialization to the extent that these experiences shape their attitudes toward law and legal authority.[320] Notions of the legitimacy of the law "are part of a broader developmental phenomenon of self-definition with regard to authority structures common to adolescence, and the resolution of autonomy-related issues, including those involving relationships with authority figures, is a central psychosocial task of this period."[321] Although little research has been done regarding adolescent legal socialization, research shows that adult legal socialization is directly related to compliance with the law and cooperation with legal actors, such as police.[322]

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315. Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOL. 99, 101 (1983).

316. *See id.* (recognizing an adolescent's status as a developing member of society).

317. Irving R. Kaufman, *Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of the Law*, 52 N.Y.U. L. REV. 1015, 1029 (1977).

318. Redding v. Safford Unified Sch. Dist. No. 1, 129 S. Ct. 2633, 2637–38 (2009); New Jersey v. T.L.O., 469 U.S. 325, 337–38 (1985).

319. *See* Melton, *supra* note 315 (supporting the notion that the effects of increased adolescent freedom would be psychologically beneficial).

320. *See* Fagan & Tyler, *supra* note 7 (indicating that adolescent's experiences "with police and other legal actors subtly shapes their perceptions of the relation between individuals and society").

321. Alex R. Piquero et al., *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267, 272 (2005).

322. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (Princeton Univ. Press 2006) (mentioning that there are two different perspectives one must understand in order to answer the question of why people follow the law: instrumental and normative,

However, one study focusing on adolescents found that perceptions of procedural justice did correlate to views regarding the legitimacy of the law.[323] This suggests that adolescents who feel that they have been treated fairly by legal authorities such as SROs will be legally socialized to have a positive orientation toward legal authority in general. Therefore, a model of school searches and seizures that increases the perception of procedural justice will in turn increase institutional legitimacy and compliance with school disciplinary rules in the long term.

C. *Restoring the Balance*

As Justice Kennedy wrote in *Graham*, "criminal procedure laws that fail to take [a] defendant['s] youthfulness into account at all would be flawed."[324] But how do we take "youthfulness into account" in a way that is consistent with the creation of democratic citizens? One way is to identify the factors that make youthfulness an important consideration, and then incorporate these factors into the reasonableness calculus. With regard to adolescents, their youthfulness is important because "this is the developmental period during which individuals are beginning to form an adult-like understanding of society and its institutions."[325] School search jurisprudence can better account for the developmental realities of adolescence in much the same way that Eighth Amendment jurisprudence does now.

The Court arrived at the holdings in *Simmons* and *Graham* by referring to "the evolving standards of decency that mark the progress of a maturing society" inherent in the Eighth Amendment's proscription against cruel and unusual punishment.[326] Similarly, the Fourth Amendment's reasonableness balancing test "does not operate in a vacuum; instead, it must comport with evolving societal norms."[327] It is an evolving standard

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with the former focusing on deterrence and avoiding penalties under the law, and the latter focusing on "what is just and moral").

323. *See* Piquero et al., *supra* note 321, 275–76 (providing the results of the test conducted by Tyler, Casper, and Fisher using a sample of 628 people accused of felonies interviewed prior to and just after their cases were heard).

324. Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2031 (2010).

325. Piquero et al., *supra* note 321, at 268.

326. *See* Roper v. Simmons, 543 U.S. 551, 560–61 (2005) (noting the Court's use of the text, history, tradition, and Eighth Amendment precedent when prohibiting cruel and unusual punishment and have referred to the standards of decency to decide which punishments are to be deemed cruel and unusual (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958))); *see also Graham*, 560 U.S. at __, at 130 S. Ct. 2021–22 (2010) (citing Roper v. Simmons, 543 U.S. 551, 572 (2005)).

327. Brief of Urban Justice Ctr. et al. as Amici Curiae in Support of the Respondents at 30, Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. __, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 906572, at *30. "[The Supreme] Court regularly consults the common law

that is based on what "society is prepared to recognize as 'reasonable.'"[328] The current school search and seizure model balances student privacy interests against the state's interest in maintaining safe schools. This binary approach creates a false choice because there are other interests at stake.

I submit that both society and students have a significant interest in the development of future citizens. This interest, which I will refer to as a "development interest," should be taken into account when determining what is reasonable under the Fourth Amendment. The framework that emerges when the development interest is factored into the reasonableness balance is a youth development approach to school search and seizure because the development interest militates in favor of a school search standard that promotes positive youth development, and democratic socialization. "The greater the area in which juveniles are free to pursue their own interests, and to act responsibly without interference, the better able they are to respond to society's many demands upon them."[329]

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in clarifying the meaning of the Fourth Amendment." *Id.* at 28. *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 299–300 (1999) (using the traditional standards of reasonableness to evaluate the search or seizure by assessing the level of intrusion against the degree to which the search or seizure is needed for the promotion of governmental interest); Wilson v. Arkansas, 514 U.S. 927, 931 (1995); Payton v. New York, 445 U.S. 573, 591 (1980) (stating that the Court has recognized that the common law provides crucial insight into "what the Framers of the Amendment might have thought to be reasonable"); United States v. Watson, 423 U.S. 411, 418–420 (1976) (stating that an arrest without an warrant was a violation of the Fourth Amendment, however, in the interest of public safety and due apprehension of criminals, arrest without a warrant should be made by law enforcement); Carroll v. United States, 267 U.S. 132, 149 (1925) (recognizing that common law provides crucial insight into what was thought to be reasonable). Historically, courts have recognized the adaptive nature of the common law standard of reasonableness in tort actions. *Id. See* J. D. LEE & BARRY A. LINDAHL, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 1.1 (2d ed. 2004) (describing "reasonableness" as a constantly changing concept that evolves with the norms of society); Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 48–49 (1915) (reasonableness is based on community standards which rely on the "teachings of common experiences" of individuals at the time of the events in question).

328. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). "In determining the meaning of 'reasonable,' the Court, in effect, has created a common law of reasonableness rather than relying on a constitutional definition found in the Fourth Amendment." George C. Thomas III & Barry S. Pollack, *Saving Rights From Remedy: A Societal View of The Fourth Amendment*, 73 B.U. L. REV. 147, 153–54 (1993). "In this way, the Fourth Amendment is like the Eighth Amendment, which also depends on a commonsense notion of what society defines as 'cruel and unusual punishment.'" *Id.* at 154.

329. Kaufman, *supra* note 317, at 1031. Kaufman asserts that giving children responsibility through the ability to pursue their own interest will increase their ability to "cope in society as a functioning and responsible adult." *Id.*

Under this new paradigm, students' Fourth Amendment rights become a tool of democratic socialization, enhancing young people's capacity for autonomous decision making and lending legitimacy to the law and legal authorities. A youth development approach mandates a probable cause standard, the standard that bestows the presumption of reasonableness on all searches and seizures because it requires a particularized, articulable basis for suspecting a disciplinary violation has occurred before a search can be undertaken.[330]

Some may argue that any "developmental interest" properly lies with the "good kids" whose positive development depends on them not being exposed to potential violence at school by their "bad" peers. Undeniably it is in the developmental interest of all children to be free from violence, but because of the malleable character of youth, individuals should not be lumped into the "good" or "bad" category so readily. The development interest discussed in this Article promotes respect and dignity among students, teachers, and law enforcement officers; that in turn contribute to a safer environment over time. Just as the problem of violence and crime in society at large will not be solved by mass incarceration, the problem of violence in school will not be solved by an aggressively punitive approach toward those who are perceived as perpetrators.

Certainly, perpetrators of school violence must be dealt with in an appropriate way, this Article argues that reducing expectations of privacy for all students is not appropriate. Safety and dignity can co-exist; the balance between privacy and government intrusion that is inherent in the probable cause standard is sufficient to achieve school safety without sacrificing student rights and thus impeding the development of future citizens. For those administrators and SROs, whose primary concern is school safety, it is important to realize that a move to probable cause would not foreclose such officials from conducting *Terry* stops (under a reasonable suspicion standard) when necessary for safety.

The youth development approach would address the three 'dangerous lessons' set forth in Part II of this Article. First, it would give practical meaning, based in actual experience, to the Constitution's lofty guarantees of privacy thus enhancing the "perception of rights as entitlements applicable to oneself."[331] Second, the youth development approach would encourage positive youth development because it would respect adolescents' developing sense of autonomy by requiring the state to "jus-

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330. *See* Whren v. United States, 517 U.S. 806, 810, 817–19 (1996) (holding searches and seizures are presumed reasonable when police have probable cause).

331. *Melton, supra* note 315. "An increase in freedom may also increase a sense of efficacy." *Id.*

tify coercive intervention" into their privacy.[332] Third, it would promote an orientation toward law and legal authority that is based on respect and trust rather than fear and control. This will yield better developmental outcomes for students because it nurtures pro-social rather than anti-social patterns of behavior.[333] Moreover, it increases the perception of fairness and equity of legal rules that fosters a sense of institutional legitimacy towards schools' disciplinary regimes.[334]

Furthermore, a shift to a probable cause standard would also address the problem of the expanding nexus between school officials and law enforcement. This was the elephant in the room in *New Jersey v. T.L.O.* Since that case was decided, police have become a prevalent fixture in public schools and it is more likely that disciplinary infractions will lead to school-based arrests and even criminal prosecutions.[335] Under a probable cause standard, students who are searched and criminally prosecuted

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332. Kaufman, *supra* note 317. Kaufman evaluates the *Juvenile Justice Standards Project* ("Standards") in his article, focusing on the section of *Standards* entitled *Rights of Minors,* and suggesting that the heart of *Standards* is the child's need for support in passing to adulthood. *Id.* at 1018, 1021, 1029. Kaufman notes that the responsible child will sometimes require guidance in the form of constraint by family and schools, but equally important is the child's need to be able to act "independently of governmental interference." *Id.* at 1031.

333. *See* People v. Scott D., 315 N.E.2d 466, 470 (N.Y. 1974).

> [A]lthough the necessities for a public school search may be greater than for one outside the school, the psychological damage that would be risked on sensitive children by random search insufficiently justified by the necessities is not tolerable. And it must also be emphasized that the scope of permissible search and, for that matter, the scope of undue risk of psychological harm, will vary significantly with the age and mental development of the child.

Id.

334. Fagan & Tyler, *supra* note 7.

> [W]hat adolescents see and experience through interactions with police and other legal actors subtly shapes their perceptions of the relation between individuals and society. These experiences influence the development of their notions of law, rules, and agreements among members of society, and the legitimacy of authority to deal fairly with citizens who violate society's rules.

Id.

335. *See* Stephen Cox & Mario Gaboury, Abstract, *Creating More Labels: Examining Juvenile Arrests in Urban and Suburban Police Departments* (Am. Soc'y of Criminology, Working Paper, 2011), *available at* http://www.allacademic.com/meta/p33380_index.html. (analyzing juvenile arrest data from a large Connecticut city and two neighboring towns, and finding that the majority of police arrests in the city were at public schools and were typically made by school-based police officers); ACLU, HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL BASED ARRESTS IN THREE CONNECTICUT TOWNS 9 (2008), *available at* http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf (finding a high rate of school based arrests by SROs in the two of the three school districts studied, the third district had higher suspension and expulsion rates which perhaps obviated the need for school based arrests).

based on the fruits of the search, will have weightier grounds to support suppression motions. Probable cause would alter the current methodology of school discipline wherein every student is viewed as a potential safety threat and treated like a criminal suspect when accused of violating school rules.[336] Moreover, probable cause would place limits on the discretion of school officials and SRO's "bent upon searching particular students suspected of wrongdoing at school," and who, under the current framework, have very "few constraints."[337]

Probable cause in school searches is also a more appropriate standard for an institution concerned with the development of citizens because:

> [T]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans and their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.[338]

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336. See *Gardner,* supra *note 73, at 943.*

> In a very real sense, each and every student stands accused, has become a "suspect," in generalized school searches, especially given the special relationship of trust which supposedly exists between student and teacher. Surely a student even indirectly accused by his teacher as a possible thief or drug user suffers a greater indignity and loss of self-esteem by being subjected to a generalized search than does an airline passenger passing through a metal detector or a driver a checkpoint.

Id. To support this he continues by writing:

> Research psychologists have discovered that two of the most stressful events in the lives of young people (fourth through sixth graders) are being accused of lying and being sent to the school principal. Presumably, therefore, students perceive being accused of wrongdoing at school as extremely stressful, both because of a fear of unpleasant sanctions and because the accusations are experienced by the young person as an affront to personal dignity and self-esteem.

Id. at 943 n.196.

337. *See id.* at 947. Gardner points out that *T.L.O.* "provides the constitutional basis for requiring individualized suspicion," which will hopefully result in the condemnation of "generalized searches and seizures in schools." *Id.* According to Gardner, an individualized suspicion requirement will provide students an entitled "modicum of . . . privacy protection." *Id.*

338. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *Olmstead* involved wire tapping of private telephone conversations, the conversations were then used as evidence against Defendants' conspiracy, and the Supreme Court determined the wire-tapping was not a search. *Id.* at 455, 469. It is relevant to note that a later case, *Katz v. United States*, resulted in the Supreme Court's decision that wire-tapping a phone booth was a search in violation of the Fourth Amendment. Katz v. United States, 389 U.S. 347, 352, 359 (1967).

If the most "comprehensive" and "valued" right is not being recognized and respected by those charged with socializing young people, how can these youth, particularly those from inner-city communities, be expected to become active and engaged contributors to American society?

Thus, probable cause is a more suitable standard in school searches because it is developmentally appropriate and sends a message to students that they are entitled to the rights and protections of citizenship, thus restoring legitimacy and encouraging engagement and participation in civil society. Respecting the rights of youth encourages positive youth development instead of preparing students for a life of reduced privacy, i.e., probation, prison, or parole; thus, school becomes an ecological development asset, building resiliency through bestowing a much-needed sense of autonomy. While a youth development approach to school searches that adopts a probable cause standard is not a panacea for our ailing public school system, if implemented correctly, it is one small step toward educating for citizenship and restoring legitimacy of the rule of law in the eyes of marginalized youth.

A youth development approach to school searches also requires changes in the way school searches are conducted. A doctrinal shift to probable cause is not enough because even if the Court overrules *T.L.O.*, it cannot legislate best practices from the bench. Boards of education must adopt policies that assure the probable cause standard is implemented in a manner that respects student's rights and fosters positive youth development. Capitalizing on the socializing value of rights, SROs and school officials should always inform students of their rights before conducting a search and explain why the student is being searched. In addition, police involvement in all school searches should be limited as much as possible. Clear standards should govern when and how the fruits of school searches are turned over to police for law enforcement purposes.[339] School search practices can be modified to this end even under the reasonable suspicion school standard.[340]

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339. *See* CATHERINE Y. KIM & I. INDIA GERONIMO, ACLU, POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K-12 SCHOOLS 8, 13, 32–34 (2009), *available at* http://www.aclu.org/pdfs/racialjustice/whitepaper_policinginschools.pdf (arguing that schools should enter into agreements with law enforcement agencies regarding the scope of the relationship between the school and the police, including which offenses should be handled by law enforcement and which should be handled by school officials).

340. *Id.* at 17, 33. In fact, under a reasonable suspicion standard, it is even more important for schools and law enforcement to memorialize the nature and scope of the relationship. *Id.*

V. Conclusion

The authority of those who teach is often an obstacle to
those who want to learn.
— Cicero

The current reality in urban public schools is that students are subjected to a pedagogy of punishment that treats students as if they pose a threat to society rather than as if they are young citizens deserving of autonomy and personhood status. Students in the public education system are often treated like criminals, and this is exacerbated by reduced Fourth Amendment protections in school searches. Abrogating Fourth Amendment rights of students in the name of public safety is not good public policy because such measures, in conjunction with other harsh disciplinary practices and increased police presence in schools, fail to achieve their purported public safety outcomes in the long term. Rather, such policies may actually induce youth to behave more anti-socially, rendering schools less safe. Therefore, although the safety gains are low, the developmental setbacks for the developing adolescent are high: when students are treated as threats to society, they become threats to society. The counterproductive nature of these policies stems from the fact that they do not account for the developmental needs of adolescents, thus they produce outcomes that are inconsistent with the stated objectives of public education.

Schools should not cultivate authoritarian environments where school officials wield absolute and unfettered power. Rather, their disciplinary policies and practices should comport with their special role in the socialization of future democratic citizens; to this end, they should respect students' autonomy, dignity, and individual rights. School search law should reflect a developmentally accurate assessment of public safety concerns, students' privacy interests, and the joint interest of students and society in the creation of democratic, law-abiding citizens. A youth development approach to school searches incorporates this joint interest into the reasonableness determination and, in doing so, calls for a probable cause standard in school searches.